(17)

No. 96-491-CFX Title: Inter-Modal Rail Employees Association, et al., Petitioners
v.
Atchison, Topeka and Santa Fe Railway Company, et al.

Docketed:
September 27, 1996

Court: United States Court of Appeals for the Ninth Circuit

| Entry | Date | Proceedings and Orders |
|---|---|---|
| | Jan 13 1996 | Brief of petitioners Inter-Modal Rail Employees Association, et al. filed. |
| | Sep 23 1996 | Petition for writ of certiorari filed. (Response due October 27, 1996) |
| | Oct 28 1996 | Brief of respondents Atchison, Topeka and Santa Fe Railway Company, et al. in opposition filed. |
| | Nov 6 1996 | DISTRIBUTED. November 27, 1996 |
| | Nov 27 1996 | Petition GRANTED. limited to Question 3 presented by the petition. The brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Monday, January 13, 1997. The brief of respondents is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Wednesday February 12, 1997. A reply brief, if any, may be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Monday, March 3, 1997. Rule 29.2 does not apply.<br>SET FOR ARGUMENT March 17, 1997.<br>********** |
| | Jan 10 1997 | Brief amici curiae of American Association of Retired Persons, et al. filed. |
| | Jan 13 1997 | Motion of petitioner to dispense with printing the joint appendix filed. |
| | Jan 13 1997 | Brief of petitioners Intermodal-Rail Employees Association, et al. filed. |
| | Jan 13 1997 | Brief amicus curiae of United States filed. |
| | Jan 21 1997 | Motion of petitioner to dispense with printing the joint appendix GRANTED. |
| | Feb 7 1997 | Record filed. |
| | Feb 11 1997 | Brief of respondents Atchison, Topeka and Santa Fe Railway Company, et al. filed. |
| | Feb 11 1997 | Brief of respondent In-Terminal Services filed. |
| | Feb 12 1997 | Brief amici curiae of The Employers Group, et al. filed. |
| | Feb 19 1997 | CIRCULATED. |
| | Feb 24 1997 | Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed. |
| | Mar 3 1997 | Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED. |
| | Mar 3 1997 | Reply brief of petitioners Inter-Modal Rail Employees Association, et al. filed. |
| | Mar 17 1997 | ARGUED. |

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FILED

No. 96 491 SEP 23 1996

OFFICE OF THE CLERK

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1996

INTER-MODAL RAIL EMPLOYEES ASSOCIATION, THOMAS FRANKS, CHARLES JONES, TOMMY MARTIN, HOYT JARRARD, and ROBERT STEIN,

*Petitioners,*

*vs.*

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, SANTA FE TERMINAL SERVICES, INC., and IN-TERMINAL SERVICES, DIVISION OF MI-JACK PRODUCTS, INC.,

*Respondents.*

*Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit*

# PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED FOR REVIEW

1. Did Congress "inadvertently fail" to exclude from regulation under §510 of ERISA a railroad employer's interference with its employees' right to receive pension benefits earned and accumulated under the Railroad Retirement Act of 1974?

a. If Congress did commit such an "inadvertent" failure, did any court have the power to correct such an oversight by grafting its vision of the legislative intention onto the plain language defining an excluded "government plan" when the pertinent exclusionary and definitional sections in ERISA were amended numerous times after enactment of the 1974 Railroad Retirement Act but Congress retained unchanged the definition of an excluded "government plan"?

2. Does a non-profit voluntary association of former employees organized to conduct litigation as a means of political advocacy have associational standing to sue to recover pension and health and welfare benefits due to its members when the association possesses their claims pursuant to irrevocable assignments, represents them under explicit and detailed powers of attorney given by the employees-beneficiaries, functions under a detailed state law, and when conducting the litigation with an association as the plaintiff is administratively convenient?

a. Does denial of standing to such a group organized for political advocacy through litigation violate any First Amendment guarantees?

3. Do allegations by employee-beneficiaries of a health and welfare benefit plan that their employer's parent company forced their employer to discharge them and to contract out their jobs to another employer in furtherance of a conspiracy to

interfere with their right to receive health and welfare benefits, state a cognizable cause of action under §510 of ERISA?



## LIST OF PARTIES TO PROCEEDING

Inter-Modal Rail Employees Association, and, in the alternative, Thomas Franks, Charles Jones, Tommy Martin, Hoyt Jarrard, and Robert Stein, filed this action against The Atchison, Topeka and Santa Fe Railway Company; Santa Fe Terminal Services, Inc.; Santa Fe Pacific Corporation; and In-Terminal Services Division of Mi-Jack Products, Inc.

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## CITATION TO LOWER COURT OPINIONS AND ORDERS

Court of Appeals: *Inter-Modal Rail Emp. Ass'n v. Atchison, Topeka*, 80 F.3d 348 (9th Cir. 1996), Case No. 93-56400.

District Court: no citations, Central District of California Case No. CV-92-06623-WJR.

## STATEMENT OF BASIS FOR JURISDICTION

The Court of Appeals entered its decision on March 27, 1996. A timely Petition for Rehearing and Suggestion for Hearing En Banc was filed. The Court of Appeals ordered Defendants to respond to that Petition. On June 24, 1996, the Court of Appeals denied the Petition and rejected the Suggestion for Rehearing En Banc.

Petitioners believe that 28 U.S.C. §1254(1) confers on this Court jurisdiction to review on a writ of certiorari the judgment of the Ninth Circuit.

## STATUTES INVOLVED IN THE CASE

29 U.S.C. §1002(1): The terms "employee welfare benefit plan" and "welfare plan" mean any plan, fund, or program ... established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or

hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits.

29 U.S.C. §1002(3): The term "employee benefit plan" or "plan" means an employee welfare benefit plan or an employee pension benefit plan or a plan which is both an employee welfare benefit plan and an employee pension benefit plan.

29 U.S.C. §1002(32): The term "government plan" means a plan established or maintained for its employees by the Government of the United States, by the government of any State or political subdivision thereof, or by any agency or instrumentality of any of the foregoing. The term "governmental plan" also includes any plan to which the Railroad Retirement Act of 1935 or 1937 applies, and which is financed by contributions required under that Act.

29 U.S.C. §1003(b): The provisions of this subchapter shall not apply to any employee benefit plan if -- (1) such plan is a governmental plan.

29 U.S.C. §1140: It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan, this subchapter, section 1201 of this title, or the Welfare and Pension Plans Disclosure Act, or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan, this subchapter, or the Welfare and Pension Plans Disclosure Act.



## STATEMENT OF THE CASE

This case presents at least three issues that are ripe for review by the Court. Any of these questions by itself would merit a grant of certiorari. The suit was filed by Inter-Modal Rail Employees Association ("IMREA") in the district court under federal question jurisdiction, 28 U.S.C. §1331. IMREA is a nonprofit mutual benefit corporation organized under California law by over 200 former employees. Its primary purposes are concerted political advocacy for workers' rights and the conduct of this litigation to advance such goals while seeking to recover pension and health and welfare benefits due to its members. IMREA holds the claims of its members pursuant to assignments and powers of attorney (App. 3).[1] Once those benefits are recovered through litigation, IMREA is required under its by-laws and the assignments and powers of attorney given to Petitioner Association by all of its members to pay all benefits recovered over to them, less stipulated attorneys' fees and litigation costs incurred.

Alternatively, the board of directors of Petitioner Association, comprised of five of these former employees, sought to be certified as class representatives of the Association's members in the event that any court might find it was not a proper party (App. 4-5). The directors and all other members of IMREA were Santa Fe Teamsters, specifically truck drivers, crane operators and cargo handlers who were involved in loading and unloading railcars and trucks.

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[1] All citations to the record before the appeals court are made as "App."

IMREA's first cause of action is under §510 of ERISA, 29 U.S.C. §1140. It alleged on behalf of its members that Respondent Atchison, Topeka & Santa Fe Railway, acting through its wholly owned subsidiary Respondent Santa Fe Terminal Services (collectively "Santa Fe") and in conspiracy with Respondent In-Terminal Services Division ("ITS"), interfered with the employees rights to receive benefits under the Railroad Retirement Act (RRA) of 1974, and under the Teamsters Union pension and health and welfare plans (App. 10-13). IMREA also filed a claim on behalf of its members for damages under the Federal Employers Liability Act (FELA), 45 U.S.C. §51, *et seq.* (App. 13-17). The court of appeals remanded for further consideration on suitability for class-action treatment. This claim is implicated by the denial of associational standing, *see infra* at 5 and Section III, since it is unclear if Petitioner Association may be a representative of the possible class.

Petitioner alleged that Respondents Santa Fe developed a scheme whereby the Railway (AT & SF) withdrew its so-called "contract" to perform inter-modal services at its Los Angeles railyard from its wholly owned subsidiary, Respondent Santa Fe Terminal Services, which had been found to be a "railroad" employer under the RRA of 1974. In fact, Santa Fe never before had used a contract between parent and subsidiary for performance of the inter-modal work. Respondents Santa Fe thus replaced themselves with Respondent ITS, a non-railroad employer, which then performed the same inter-modal work at the Santa Fe railyard with the same Santa Fe equipment and vehicles. Under their scheme, Respondents Santa Fe discharged all of the subsidiary's "railroad" employees, including the members of IMREA. The Association alleged that the purpose of this plan was illegal and violated ERISA since it was formulated and implemented with the specific intent to interfere



with and deprive IMREA's members of their right to receive pension benefits under the RRA of 1974 and under retirement and health and welfare benefit plans of the Teamsters' Union (App. 6-13). Santa Fe's intent to escape payment of contributions required by the Railroad Retirement Board for "railroad" employees was explicitly documented in a sworn declaration made by the president of the Santa Fe subsidiary (App. 59-62).

The district court granted Respondents' motion to dismiss each and every claim under §510 of ERISA for interference with the various employee benefits (App. 28-29).

The *per curiam* opinion of a panel of the court of appeals first held that IMREA lacked standing to bring suit on the ERISA and FELA claims on its members' behalf. The court reasoned that "to establish the individualized damages sought in both the ERISA and FELA claims, each employee member would have to participate in the lawsuit." 80 F.3d at 350. This decision, of course, was made without the benefit of this Court's magisterial decision on associational standing, *UFCW v. Brown Group*, 116 S.Ct. 1529 (1996), entered shortly after. The appeals court *sua sponte* raised for the first time any issue about the associational standing of IMREA. No Respondent had argued in the district court or the court of appeals that IMREA lacked associational standing. Thus, Petitioner never had an opportunity to argue the constitutional objections to the standing determination, i.e., that denying IMREA associational standing infringed on the members' rights of free association, speech, and petition, or the other considerations which favored standing.

The appeals court reversed the district court's dismissal of the §510 claim against each Defendant for conspiracy to

interfere with the employees' Teamster pension benefits. 80 F.3d at 350-51. The Ninth Circuit, however, upheld the dismissal of the claims for interference with RRA pension benefits and Teamster welfare benefits. *Id.* at 351-52.

The appeals court found that under its decisions claims for interference with the right to receive health and welfare benefits are not cognizable under ERISA since those benefits do not vest, and employees supposedly thus have no present right to receive them. *Id.* at 351. The appeals court recognized that its holding conflicts with decisions of the Seventh and Eleventh Circuits. *Id.* at 351, n.6. Furthermore, the appeals court's opinion on this issue failed to consider this Court's decision in *Varity Corp. v. Howe*, 116 S.Ct. 1065 (1996), rendered shortly before then which upheld a claim under §510 of ERISA for interference with the right to receive health and welfare benefits.

In rejecting Petitioner's claim under ERISA for interference with the right to receive benefits mandated by the RRA of 1974, the Ninth Circuit held that Congress "inadvertent[ly] fail[ed]" to include the 1974 RRA within the exemption from regulation for any "government plan." *Id.* at 351. Congress defined "government plan" in §3(32) of ERISA "to include any plan to which the Railroad Retirement Act of 1935 or 1937 applies". Thus, the appeals court's decision conflicted squarely with the plain language of the statute. It ignored controlling precedents of the Court on legislative interpretation, such as *West Virginia Univ. Hosp. v. Casey*, 499 U.S. 83, 111 S.Ct. 1138 (1991) and *Massachusetts Mutual v. Russell*, 473 U.S. 134, 105 S.Ct. 3085 (1985). The decision below thus presents three major clusters of issues that are of compelling significance and ripe for review. Any one of these issues by itself will suffice for the grant of certiorari.



## REASONS FOR GRANTING THE WRIT

### I.

### THE OPINION BELOW CONFLICTS WITH THE PLAIN LANGUAGE OF ERISA WHICH DOES NOT EXCLUDE CLAIMS FOR INTERFERENCE WITH BENEFITS UNDER THE RAILROAD RETIREMENT ACT OF 1974.

The *per curiam* opinion below conflicts with the plain language of ERISA on the question whether interference with the right of employees to receive railroad retirement benefits, under the Railroad Retirement Act of 1974 ("the 1974 Act") is actionable under ERISA. Excluded by its terms from ERISA is any "government plan." 29 U.S.C. §1003(b)(1). ERISA states that "[t]he term government plan also includes any plan to which the Railroad Retirement Act of *1935 or 1937* applies, and which is financed by contributions required under that Act." 29 U.S.C. §1002(32) (emphasis added). Despite numerous amendments to the definitional section in ERISA since the 1974 Act was signed into law, Congress has never chosen to include the 1974 Act within the exclusion from ERISA's remedial scheme. Yet the district court and the court of appeals had no hesitation in so legislating.

The opinion found that Congress "inadvertent[ly] fail[ed] to specifically identify" the 1974 Act in §1002. 80 F.3d at 351. And the Congress' failure was "understandable" because the 1974 Act was enacted a few weeks after ERISA. *Id.* at 352. Congress, however, amended the definitional section at least nine times after the 1974 Act was passed, but never placed the 1974 Act in the exclusion provision. The courts are not

permitted to assume that Congress inadvertently omitted a particular portion of a statute. *Massachusetts Mutual v. Russell*, 473 U.S. 134, 143, 105 S.Ct. 3085, 3092 (1985) (finding the "assumption of an inadvertent omission" in ERISA "especially suspect") and *West Virg. Univ. Hosp. v. Casey*, 499 U.S. 83, 101, 111 S.Ct. 1138 (1991) ("to supply omissions [in a statute] transcends the judicial function") (quoting Brandeis, J.).

In *Varity Corp. v. Howe*, 116 S.Ct. 1065 (1996), the Court broadly interpreted ERISA's remedial section to provide wronged employees with a direct remedy under that statute when their employer bilked then of welfare and health benefits. The Court found that

> ERISA's basic purposes favor a reading of the third subsection [§1132(a)(3)] that provides the plaintiffs with a remedy. The statute itself says that it seeks "to protect...the interests of participants...and...beneficiaries...by establishing standards of conduct, responsibility, and obligation for fiduciaries ... and ... providing for appropriate remedies ... and *ready access to the Federal courts*".

116 S.Ct. at 1078 (emphasis added). Under the circuit court's interpretation of ERISA, however, employees have no access to a Federal court to obtain a remedy for any wrongful interference, no matter how intentional, with their right to receive benefits under the Railroad Retirement Act of 1974. That conflicts with the specific intent of ERISA as interpreted by this Court. Yet, perhaps paradoxically, the appeals court's decision also contravenes the priciples of the dissenting justices in *Varity* who followed the teachings of Justice Scalia in regard to "plain language" interpretation of Congressional intent. *Id.* at



1081-82, 1085-86 (Thomas, J., dissenting). The opinion below reached a perverse result from the standpoint of public policy, and it did so for a perverse reason under principles of statutory construction. Its scanty reasoning offends the holdings of both the majority and the dissent in *Varity*.

There are valid policy reasons to believe the Congress rationally intended that interference with benefits under the 1974 Railroad Retirement Act should fall within the regulatory sweep of ERISA. In 1974 ERISA was a newly enacted, all-encompassing scheme to regulate the provision of employment benefits. The Railroad Retirement Act of 1974 was contemporaneous legislation addressing a particular aspect of the same concerns, and already had been reported out for favorable action by the committees of Congress. *See* S. Rep. No. 93-129, *reprinted in*, 1974 U.S. Code Cong. & Admin. News 4838 (ERISA) and S. Rep. No. 93-1163, *reprinted in*, 1974 U.S. Code Cong. & Admin. News 5702 (RRA). In its efforts to address such policy issues as underfunding, poorly-administered plans, failures to pay benefits, and interference with rights to benefits, Congress very well could have decided rationally that it would further its purposes by drawing a distinction between the old 1935 and 1937 Railroad Retirement Acts and the forthcoming Act of 1974. By carefully defining the "governmental plan" exemption in language drafted to exclude the forthcoming (not yet finally approved) new Railroad Retirement Act of 1974, Congress rationally chose to include "railroad" employers' prospective operations within the ERISA regulatory scheme.

Obviously Congress in 1974 was concerned about the protection of railroad workers' pension rights, as the Court noted in *U.S. Railroad Retirement Bd. v. Fritz*, 449 U.S. 166, 101 S.Ct. 453 (1980). Congress did not suggest in the

legislative history of the RRA or that of ERISA, that it intended either to authorize private "railroad" employers to interfere with their workers' pension rights or to rely upon this class of employers alone among all private employers to treat their employees well of their own volition. Once the Railroad Retirement Act of 1974 had been enacted, operations under the 1935 and 1937 Acts were to be restricted to administration, investment, calculation and disbursement of already-contributed funds by the Railroad Retirement Board, a government agency. So the Congressional drafters reasonably exempted those old Acts as "governmental" plans, while including within the sweep of the newly-enacted ERISA statute the prospective operations of private "railroad" employers under the forthcoming 1974 Act. The court of appeals inference with a legitimate Congressional policy choice is heightened by the omission of any specific pension-interference language from the contemporaneously drafted 1974 Railroad Retirement Act.

Congress rationally could well have believed that ERISA should not govern issues relating to pre-1974 acts of interference with retirement benefits or contributions under the 1935 and 1937 Railroad Retirement Acts, but that like issues under the 1974 Railroad Retirement Act should be regulated by ERISA's more comprehensive statutory scheme. That was a decision for Congress to make, not one for any Court to supply after the fact. Providing wronged "railroad employees" with a federal court remedy under ERISA for their employer's actions to intentionally cut off their eligibility for railroad retirement benefits does not interfere with the jurisdiction of the Railroad Retirement Board to perform its statutory mandates relating to the funding or payment of benefits. Providing these wronged "railroad" employees with an ERISA remedy is not repugnant to the Congressional intent under ERISA, and creates no conflict between these statutes. This is especially true since the Railroad



Retirement Board is imbued with no remedial powers to make whole wronged employees as the federal courts are empowered to do under ERISA.

## II.

## THE COURT OF APPEALS' DECISION THAT PLAINTIFF DID NOT STATE A CLAIM UNDER ERISA FOR INTERFERENCE WITH THE RIGHT TO RECEIVE HEALTH AND WELFARE BENEFITS CONFLICTS WITH DECISIONS OF THE SUPREME COURT AND TWO COURTS OF APPEAL.

In *Varity Corp. v. Howe*, *supra*, the employees sued under ERISA for breaches of fiduciary duties by their former employer and the company that controlled their former employer. The employees alleged that they were induced to switch from their old employer to a new company by fraudulent misrepresentations that their health and welfare and pension benefits would not be affected and that the new company would be sound. 116 S.Ct. at 1068-69. In fact, Varity planned that Massey Combines would fail and that Massey Ferguson would be released from various debts, including "promises to pay medical and other non-pension benefits". *Id.* In its second year of operation, Massey Combines ended up in receivership "under which the employees lost their non-pension benefits". *Id.*

This Court held that the employees had the right to sue under ERISA for violations of ERISA-imposed fiduciary obligations to administer the health and welfare benefit plan solely in the interests of the employee beneficiaries. The Court found that the employees' claim existed by virtue of §502(a)(3)

of ERISA, providing for the recovery of "other appropriate equitable relief," 29 U.S.C. §1132(a)(3).[2]

While the Court did not precisely address the question presented here, *Varity* stands for the rule that employees may sue under ERISA for wrongful interference with the right to receive health and welfare benefits. But the court of appeals held that such benefits are beyond the reach of an ERISA interference action. Such is contrary to the rule in at least two other circuits, as the Ninth Circuit noted in footnote 6 to its *per curiam* opinion. In *Seaman v. Arvida Realty Sales*, 985 F.2d 543 (11th Cir. 1993), *cert. den.*, 114 S.Ct. 308 (1994), the Eleventh Circuit held that an employee who had been fired because she refused to convert her job status to an independent contractor, with a loss of non-vested health insurance coverage, stated a claim under §510 of ERISA for "discharge...for the purpose of interfering with the *attainment of any right* to which such participant *may become entitled* under the plan" (emphasis supplied). In *Heath v. Varity Corp.*, 71 F.3d 256 (7th Cir. 1995), the Seventh Circuit found actionable under §510 interference with non-vested benefits through discharge from employment.

If Congress had any intent to exclude from actions under §510 interference with the right to receive health and welfare benefits, or any other non-vested benefits, it could have stated so in the statute, or at least in the legislative history. Neither the appeals court nor Respondents have cited any provision of the statute or its history which compels such a narrow reading of

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[2]The district court in *Varity* had ordered that the employees be reinstated into the Massey Ferguson health and welfare plan, and ordered payment of "certain monetary relief" that was not at issue before the Court. 116 S.Ct. at 1069.



this remedial statute. Indeed, by its plain language §510 expressly prohibits employers from discharging employees "for exercising any right to which he is entitled under the provisions of an employee benefit plan...or for the purpose of interfering with the *attainment* of any right to which such participant *may become entitled* under the plan" (emphasis added). The highlighted portions of the second clause strongly indicate that the statute prohibits interference with the attainment of future employee benefits, particularly when read along with the first phrase which speaks in the present tense.[3] Moreover, §3(1) and §3(3) of ERISA by their plain language define the term "employee benefit plan" to include plans providing health and welfare benefits. 29 U.S.C. §1002(1) and (3). So the distinction between such benefits and pensions is an anomaly under the obvious intent of Congress.

The *per curiam* opinion below thus conflicts with the teachings of *Varity* and the holdings of the Seventh and Eleventh Circuits. Certiorari should be granted to resolve this conflict, as well as the conflict between the plain language of Congress and the anomalous distinction drawn by the court of appeals between pension benefits and health and welfare benefits.

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[3]In another context, this Court has indicated that the word "may" means "contingency or liability, or possibility or probability." *U.S. v. Lexington Mill*, 232 U.S. 399, 411, 34 S.Ct. 337 (1914). Webster's defines the word "become," in one of its meanings, as "to pass from one state to another; to enter into some state or condition, by a change from another state or condition, or by assuming or receiving new properties or qualities, additional matter, or a new character ..., to come into being." *Webster's New Universal Unabridged Dictionary* p. 164 (2d ed. 1983).

## III.

**THE *SUA SPONTE* RULING THAT IMREA DOES NOT HAVE ASSOCIATIONAL STANDING TO SUE CONFLICTS WITH THIS COURT'S *BROWN GROUP* DECISION, INTERFERES WITH THE FIRST AMENDMENT RIGHTS OF THE ASSOCIATION'S MEMBERS, AND OVERLOOKS THE CRITICAL FACTS THAT IMREA HOLDS THE CLAIMS OF ITS MEMBERS PURSUANT TO IRREVOCABLE ASSIGNMENTS AND REPRESENTS THEM UNDER EXPRESS POWERS OF ATTORNEY.**

Very recently, in *UFCW v. Brown Group*, 116 S.Ct. 1529 (1996), this Court unanimously revised the law of associational standing. In that case, a local union filed suit on behalf of its members for back pay under the WARN Act, 29 U.S.C. §§2101 *et seq*. The employer argued that the association (a labor union) itself must have suffered injury to have standing to sue and thus, since the union was not injured, the union members would have to appear individually in the case. Following this Court's previous standing decisions, the district court and the court of appeals there had ruled that the union did not have associational standing. But the Court reversed.



Although the Court reaffirmed its three-prong associational standing test,[4] it held that an association need satisfy only the first two prongs to meet the constitutional requirements of case and controversy in Article III and thus have standing to sue for members' damages.

> [O]nce an association has satisfied *Hunt's* first and second prongs assuring adversarial vigor in pursuing a claim for which member Article III standing exists, it is difficult to see a constitutional necessity for anything more.

116 S.Ct. at 1536. The Court held that the third prong of the test has analytical or "prudential" value by "focusing on these matters of administrative convenience and efficiency, not on elements of a case or controversy within the meaning of the Constitution." *Id*.

But the *per curiam* decision of the court of appeals here reflexively and without analysis simply found no standing. Since it reached the conclusion *sua sponte* there was no development of the issue. Neither the district court nor any defendant had raised this point below. There was no focus upon the factual record, Petitioners' Complaint, of several key factual distinctions that militated for associational standing. The directors are all themselves part of the affected group of former employees. The Association is organized as a non-profit corporation under a California statute that requires precise ethical standards and organizational guarantees. Cal. Corp. Code §7230 *et seq*. All members including the directors have assigned their rights

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[4]*See Hunt v. Washington State Apple Advt. Com'n.*, 432 U.S. 333, 343, 97 S.Ct. 2434 (1977).

irrevocably to their Association. The Association acts on their behalf under extensive, specific powers of attorney (App. 3). The Association was formed out of the members' wishes to redeem more effectively their First Amendment rights. *Id.* at 3-5.

The Court in *Brown Group* found that the district court's inquiry under the third prong must focus on whether statutory or common law recognizes "in certain circumstances, particular relationships ... are sufficient to rebut the background presumption ... that litigants may not assert the rights of absent third parties". 116 S.Ct. at 1536. Under this new approach, the district court should examine whether an association will have records or evidence to support damages claims, and whether the damages will find their way into the pockets of its members. *Id.* This Association has such evidence, and the "particular relationships" of Petitioner's members to it are more than sufficient. *See, e.g., Weiner v. Mullaney*, 59 Cal.App.2d 620, 638 (1943).

The Court noted that many federal laws, including the FLSA and class action rules, as well as common law *parens patriae* suits and executor's actions "permit one person to sue on behalf of another, **even where damages are sought**". *Id.* at 1536-37 (emphasis added). Thus, the fact that individual members of an association may need to participate in a case to establish claims for individualized damages, as under WARN, does not prevent that association from filing suit.

Under the *Brown Group* standard, IMREA clearly should enjoy associational standing. IMREA satisfies the test's first two prongs. Its members otherwise have standing to sue for their lost pension and health and welfare benefits. Promoting the interests of its members in obtaining recovery of their lost



wages and pension benefits is one of IMREA's purposes declared in its bylaws and alleged in the Complaint (App. 3). The California mutual benefit corporation law under which IMREA exists permits Petitioner to undertake "any lawful purpose" and affords it "all of the powers of a natural person," including the right to sue and be sued. Cal. Corp. Code §§7111 and 7140, and *Santa Clara County Contractors & Homebuilders Assoc. v. City of Santa Clara*, 232 Cal.App.2d 564, 570 (1965).

As for the third prong, proceeding with one "plaintiff" in this action promotes administrative convenience without sacrificing adversarial intensity or the ability to obtain evidence. It tends to guarantee that IMREA's members will recover their pensions and other losses at a lower cost for attorneys' fees and litigation expenses and without inconsistent results. If this issue had been developed before the *per curiam* panel sprung it *sua sponte*, Petitioner could have shown that it will not keep any portion of the recovery it obtains for its members.

In short, no meritorious reason exists why IMREA should not have the same associational standing as did the UFCW union in *Brown Group*. IMREA very likely represents its members' interests more closely than do most unions. IMREA's directors are among the affected employees, and have themselves assigned their claims to their Association. By contrast, salaried bureaucracies somewhat removed from their actual employees, head most unions.

Denying IMREA associational standing tramples upon the First Amendment freedoms of association, speech and petition of its members. In *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 92 S.Ct. 609, 612 (1972), the Court held that

> it would be destructive of rights of association and of petition to hold that groups with common interests may not, without violating the anti-trust laws, use the channels and procedures of state and federal agencies and courts to advocate their causes and points of view respecting resolution of their business and economic interests.

In NAACP v. Button, 371 U.S. 415, 83 S.Ct. 328 (1963) the Court struck down a Virginia law that had the effect of prohibiting the NAACP from referring or recommending that aggrieved persons retain an NAACP attorney. The Court found that the law violated the First Amendment rights of freedom to associate and of free speech since it, "**at least potentially**, prohibits every cooperative activity that would make advocacy of litigation meaningful." 371 U.S. at 437-38 (emphasis supplied). Further, the Court held that "only a compelling state interest in the regulation of a subject ... can justify limiting First Amendment freedoms." *Id.* at 438. In *NAACP v. Alabama*, 357 U.S. 449, 78 S.Ct. 1163, 1171 (1958), the Court held that an act which "may have the effect of curtailing the freedom to associate is subject to the closest scrutiny". The Court there also noted that "[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association". *Id.* Here the court of appeals simply ignored all such considerations without pausing to engage in any scrutiny, much less a careful balancing of its precedents against the free speech and other First Amendment guarantees implicated.

Denying Santa Fe's former employees their chosen method of recovering lost pension and health and welfare



benefits impinges on their right to freedom of association because it interferes with IMREA's *raisons d'etre* -- uniting volutarily for political advocacy while litigating its members' claims, all the while receiving representation by their attorneys of choice in the least expensive manner possible. The individual claims of many of Petitioner's members are not so grand that they could easily retain counsel to represent each one.

Under settled law Petitioner Association enjoys standing to proceed, pursuant to assignments of claims from its members, on the ERISA §510 cause of action for interference with their rights to receive pension and health and welfare benefits. *Misic v. Building Service Emp. Health Plan*, 789 F.2d 1374, 1378-79 (9th Cir. 1986) (health care provider had standing to sue under ERISA for recovery of unpaid heath insurance benefits, pursuant to a valid assignment). Unquestionably, IMREA's representation of its member's interest in this litigation satisfies the Article III requirements of case and controversy; the denial of standing abridges their freedom of association and adversely impacts their fundamental rights of free speech and petition.

## CONCLUSION

Because the court of appeals' ruling *per curiam* conflicts with two recent holdings of the Court, as well as with decisions of at least two other circuits on issues relating to the continued security of retirement and other employment benefits, it is vitally important to the productive wheel horses of our society - the employed men and women of this Nation - that the Court grant certiorari to review the somewhat cavalier holdings of the *per curiam* opinion. The national operations of the railroad and transportation employers involved in this case, and maintenance of the express goal of ERISA to promote uniform regulation of pension and health and welfare plans, 29 U.S.C. §1001, strongly

counsel the Court to grant certiorari to achieve uniformity of decisional law under ERISA. On an even more fundamental level, the decision below disregards the precept that ours is a government premised on the separation of power among three equal branches. Its holding that a court may remedy an "inadvertent failure" of Congress in drafting legislation to change the plain language of a statute flouts the binding precedents of the Court. Of equal, if not greater significance is the detrimental effect wrought by the court of appeals upon the freedom of association and other First Amendment rights of the members of Petitioner in denying standing to sue to their voluntary citizens' group. The absence of any level of scrutiny upon this abridgement of fundamental rights by the court below further militates for the grant of a writ of certiorari.

Respectfully submitted,

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# APPENDIX

Appendix I — Opinion of the United States Court of Appeals for the Ninth Circuit Filed March 27, 1996 ..... 1a

Appendix II — Order of the United States District Court for the Northern District of California Filed April 23, 1993 ..... 16a

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Appendix V — Affidavit of R. M. Dushek ..... 37a



## APPENDIX I — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED MARCH 27, 1996

United States Court Of Appeals
For The Ninth Circuit

No. 93-56400
D.C. No. CV-92-06623-WJR

Inter-Modal Rail Employees Association; Thomas Franks; Charles Jones; Thomas J. Martin; Hoyt Jarrard; Robert Stein,

Plaintiffs-Appellants,

v.

The Atchison, Topeka And Santa Fe Railway Company; In-Terminal Services, Division Of Mi-Jack Products, Inc., An Illinois Corp.,

Defendants-Appellees.

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No. 94-55188
D.C. No. CV-92-06623-WJR

Inter-Modal Rail Employees Association; Thomas Franks; Charles Jones; Thomas J. Martin; Hoyt Jarrard; Robert Stein,

Plaintiffs-Appellants,

v.

The Atchison, Topeka And Santa Fe Railway Company; Santa Fe Terminal Services, Inc.,

Defendants-Appellees.

*Appendix I*

Appeals from the United States District Court for the Central District of California
William J. Rea, District Judge, Presiding

Argued and Submitted
March 6, 1995 — Pasadena, California

Filed: March 27, 1996

Before: JAMES R. BROWNING and ROBERT R. BEEZER, Circuit Judges, and Ancer L. Haggerty,* District Judge.

Per Curiam Opinion

## SUMMARY

### Labor and Employment/ERISA/ Litigation and Procedure (Civil)

The court of appeals affirmed in part a district court judgment reversed in part, vacated in part, and remanded. The court held that all Railroad Retirement Act plans are exempt from the Employee Retirement Income Security Act of 1974 (ERISA), and, thus, former employees' claim of interference with benefits due them under the Railroad Retirement Act of 1974 was properly dismissed.

Appellee Atchison, Topeka and Santa Fe Railway Co. transferred cargo handling work from a wholly-owned subsidiary, Santa Fe Terminal Services, Inc. (SFTS), to an independent corporation, appellee In-Terminal Services, Division of Mi-Jack Products, Inc. Employees of SFTS lost their jobs as a result of the transfer. The former employees

*Honorable Ancer L. Haggerty, District Judge, United States District Court for the District of Oregon, sitting by designation.



*Appendix I*

had been entitled to retirement benefits under the Railroad Retirement Act of 1974 and to pension, health, and welfare benefits under collective bargaining agreements.

Appellant Inter-Modal Rail Employees Association (the Association) represented the former SFTS employees. The Association and five of its members (collectively, the Plaintiffs) sued Atchison, SFTS, and In-Terminal (collectively, the Defendants), alleging that the Defendants violated ERISA by conspiring to transfer the work from SFTS to In-Terminal for the express purpose of depriving Association members of pension and welfare benefits. They also alleged that Atchison and SFTS violated the Federal Employer's Liability Act (FELA) by improperly exposing Association members to harmful levels of noise and toxic chemicals.

The district court dismissed the complaint for failure to state a claim upon which relief could be granted. The court awarded attorneys' fees based on the premature filing by the Plaintiffs of a notice of appeal. The Plaintiffs appealed.

[1] The Association lacked standing to bring suit on the ERISA and FELA claims on its members' behalf.

[2] The Plaintiffs stated a claim under an ERISA section that protects participants in a plan from termination that is motivated by an employer's desire to prevent vesting of a pension.

[3] However, the Plaintiffs' claim of interference with their welfare benefits was properly dismissed. Welfare benefits do not vest. Employees have no present "right" to future, anticipated welfare benefits.

[4] The Plaintiffs' claim of interference with benefits due them under the Railroad Retirement Act of 1974 was also properly dismissed. An ERISA section excludes from coverage any "governmental plan," which

is defined as including "any plan to which the Railroad Retirement Act of 1935 or 1937 applies." All Railroad Retirement Act plans are exempt from ERISA.

[5] Failure to add a specific reference to the 1974 Railroad Retirement Act in the ERISA section was understandable. ERISA was enacted before the Railroad Retirement Act of 1974.

[6] A construction of the ERISA section that exempted all Railroad Retirement Act plans accorded with Congress' clear purpose and avoided anomalous results.

[7] There appeared to be no absolute legal bar to class certification of FELA claims. Dismissal of the FELA count before answer or discovery in this case was improper.

[8] Remand for appropriate findings was required in regard to the attorneys' fee award. The district court made no finding of recklessness or bad faith.

## COUNSEL

Richard E. Schwartz and James E. Parrot, Richard Schwartz & Associates Ltd., St. Louis, Missouri, for the plaintiffs-appellants.

Ronald W. Novotny, Hill Farrer & Burrill, Los Angeles, California, for defendants-appellees The Atchison, Topeka and Santa Fe Railway Company and Santa Fe Terminal Services, Inc.

Robert L. Zaletel, Keck, Mahin & Cate, San Francisco, California, for defendant-appellee In-Terminal Services.





## OPINION

PER CURIAM:

Inter-Modal Rail Employees Association and five of its members, plaintiffs below, appeal the dismissal of their complaint under the Employee Retirement Income Security Act of 1974 ("ERISA") and the Federal Employer's Liability Act ("FELA") for failure to state a claim on which relief could be granted. In a related appeal, plaintiffs challenge an award of attorneys fees based on the premature filing by plaintiffs of an earlier notice of appeal.

### I.

Defendant Atchison, Topeka and Santa Fe Railway Company transferred certain cargo handling work from a wholly-owned subsidiary, defendant Santa Fe Terminal Services, Inc., to an independent corporation, defendant In-Terminal Services Division of Mi-Jack Products, Inc.[1] The Association represents former employees of Santa Fe Terminal Services who lost their jobs as a result of the transfer. The complaint alleges (1) defendants violated Section 510 of ERISA by conspiring to transfer the work from Santa Fe Terminal Services to In-Terminal Services for the express purpose of depriving members of the Association of pension and welfare benefits;[2] and (2) Santa Fe Railway Company and Santa Fe Terminal Services violated

---

[1]Also named as a defendant is Santa Fe Pacific Corporation, alleged to have "exercised day-to-day management control over the affairs of its wholly-owed subsidiary, defendant [Santa Fe Railway Company]."

[2] 29 U.S.C. §1140 provides:

> It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary [of an ERISA plan] for exercising any right to which he is entitled...or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan...

FELA by improperly exposing members of the Association to harmful levels of noise and toxic chemicals.[3]

[1] To establish the individualized damages sought in both the ERISA and FELA claims, each employee member would have to participate in the lawsuit. *United Union of Roofers, Waterproofers & Allied Trade No. 40 v. Insurance Corp. of America*, 919 F.2d 1398, 1400 (9th Cir. 1990). The Association therefore lacks standing to bring suit on these claims on the members' behalf. *Id.* However, plaintiffs requested that if the Association were found not to be a proper party to act on behalf of its members, the named individual members be certified as representatives of a class to proceed with the action on behalf of members of the Association.

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[3] 45 U.S.C. §51 provides:

Every common carrier by railroad while engaging in commerce between any of the several States...shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce...for such injury... resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier...



## II.

## ERISA[4]

As employees of Santa Fe Terminal Services, the individual plaintiffs were entitled to retirement benefits under the Railroad Retirement Act of 1974, and to pension, health and welfare benefits under collective bargaining agreements with the Teamsters Union. As a result of their discharge, plaintiffs lost their Railroad Retirement Act benefits and suffered a substantial reduction in Teamster benefits. Plaintiffs allege defendants "entered into a wrongful conspiracy" to transfer the work from Santa Fe Terminal Services to In-Terminal Services "for the express purpose of avoiding" payment of contributions to the Railroad Retirement Fund and minimizing payments for Teamster benefits.[5]

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[4] At Oral Argument, defendants raised for the first time a statute of limitations defense to plaintiffs' ERISA claims. We declined to consider the issue. *Rothman v. Hospital Service of Southern California*, 510 F.2d 956, 960 (9th Cir. 1975) ("It is well-established principle that in most instances an appellant may not present arguments in the Court of Appeals that it did not properly raise in the court below.").

[5] We reject In-Terminal Service's argument that section 510 does not support a cause of action against a non-employer for conspiring with an employer to interfere with ERISA-protected benefits. We held in *Tingey v. Pixley-Richards West, Inc.*, 953 F.2d 1124, 1132 n.4 (9th Cir. 1992), that section 510 provides a cause of action against an insurer who "coerces an employer to fire an employee." We noted that section 510 imposes liability on "any person," not just "any employer," and rejected contentions that the statute's use of such terms as "discharge, fine, suspend, expel, discipline, [and] discriminate" suggest direct punitive action by one in a position to exercise control over the terms of employment. *See id.*; 29 U.S.C. §1140. We see no basis for distinguishing a coercive insurer from a successor such as In-Terminal who conspires with an employer to interfere with ERISA-protected rights. *But see Byrd v. MacPapers, Inc.*, 961 F.2d 157, 161 (11th Cir. 1992).

*Appendix I*

A. Teamster Benefits

1. Teamster Pension Benefits

[2] Plaintiffs clearly stated a claim under section 510 of ERISA, which "protects plan participants from termination motivated by an employer's desire to prevent a pension from vesting." *Ingersoll-Rand v. McClendon*, 498 U.S. 133, 143 (1990). Defendants contend that an incidental or consequential loss of future, unaccrued pension benefits is not actionable; but, as plaintiffs correctly note, questions of motivation and intent are not to be resolved at the pleading stage.

2. Teamster Welfare Benefits

[3] Plaintiffs' claim of interference with their welfare benefits was properly dismissed. It is the law of this circuit that section 510 "does not prohibit an employer from altering the package of medical benefits that it provides its employees, but only from interfering with an employee's use of the benefits provided." *DeVoll v. Burdick Painting, Inc.*, 35 F.3d 408, 411 (9th Cir. 1994).[6] Unlike pension benefits, welfare benefits do not vest. *See* 29 U.S.C. §1051(1); *Joanou v. Coca-Cola Company*, 98 F.3d 96, 98 (9th Cir. 1994); *West v. Greyhound Corp.*, 813 F.2d 951, 954 (9th Cir. 1987). Accordingly, employers "remain free to unilaterally *amend* or *eliminate* such plans without considering the employees' interests." *DeVoll*, 35 F.3d at 411 (quoting *Joanou*, 26 F.3d at 98); *see also* Joan Vogel, *Containing Medical and Disability Costs by Cutting Unhealthy Employees: Does Section 510*

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[6]Other circuits have reached a contrary conclusion. *See Seaman v. Arvida Realty Sales*, 985 F.2d 543, 546 (11th Cir. 1993) ("The validity of a §510 claim does not hinge upon whether the benefits involved are vested but upon the purpose of the discharge."); *Tolle v. Carroll Touch, Inc.*, 977 F.2d 1129, 1134 (7th Cir. 1992) ("[T]he emphasis of a Section 510 action is to prevent persons and entities from taking actions which might cut off or interfere with a participant's ability to collect present or future benefits or which punish a participant for exercising his or her rights under an employee benefit plan.").



*Appendix I*

*of ERISA Provide a Remedy?*, 62 Notre Dame L. Rev. 1024, 1060 (1987) (noting that "[a]n employer can deprive employees of benefits and avoid liability under section 510 simply by terminating the medical and disability benefit plan entirely," rather than selectively terminating the coverage of individual employees). As we held in *West v. Greyhound Corp.*, 813 F.2d at 955, no action lies under section 510 for an employer's refusal to hire employees of its predecessor because the employees insist upon maintenance of previous benefit levels; existence of a present "right" is prerequisite to section 510 relief, and employees have no present "right" to future, anticipated welfare benefits. *Id.* at 954.

B. Railroad Retirement Act Benefits

[4] Plaintiffs' claim of interference with benefits due them under the Railroad Retirement Act of 1974 was also properly dismissed. Section 1003(b) of ERISA excludes from coverage any "governmental plan," defined as including "any plan to which the Railroad Retirement Act of 1935 or 1937 applies.") *See* 29 U.S.C. §1002(32). Plaintiffs argue that because Section 1002(32) does not refer to the Railroad Retirement Act of 1974, railroad retirement plans under the 1974 Act are not excluded from coverage by ERISA.[7] We conclude that all Railroad Retirement Act plans are exempt from ERISA. This construction is required to accomplish Congress' purpose and is not precluded by the inadvertent failure to specifically identify the 1974 statute in section 1003.

ERISA was adopted to meet a perceived need for minimum federal standards to govern private pension plans. *See* 29 U.S.C. §1001(a); H.R. Rep. No. 807, 93rd Cong., 2nd Sess., *reprinted in* 1974

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[7]Defendants also argue that a retirement plan under the Railroad Retirement Act is not an "employee benefit plan" within the meaning of §1003(b). Because the definition of "governmental plan" in §1003(b) explicitly includes "any plan to which the Railroad Retirement Act of 1935 or 1937" applies, §1003(b) necessarily contemplates that Railroad Retirement Act plans are "employee benefit plan[s]" within the coverage of the exemption.

U.S.C.C.A.N. 4670, 4676-81; H.R. Rep. No. 533, 93rd Cong. 2nd Sess., *reprinted in* 1974 U.S.C.C.A.N. 4639, 4640-46. It is reasonable to assume plans under the 1935 and 1937 Railroad Retirement Acts were excluded from ERISA because such plans were already subject to independent federally administered statutory controls and were not plagued by the problems affecting private pension plans. This is equally true of plans adopted under the 1974 Railroad Retirement Act.

The benefit and contribution levels in plans under the 1974 Act are prescribed by that Act and regulations issued under it, *see* 20 C.F.R. §200.1 et seq., and are administered by the Railroad Retirement Board, an independent executive agency, *see* 45 U.S.C. §231 et seq., just as are plans issued under the two earlier revisions. Indeed, the 1974 Act added to the financial stability of Railroad Retirement Act plans and strengthened government controls over such plans, thus further diminishing any need for ERISA coverage. *See* S. Rep. No. 1163, 93rd Cong.,, 2nd Sess., *reprinted in* 1974, U.S.C.C.A.N. 5702, 5702-14; *U.S. Railroad Board v. Fritz*, 449 U.S. 166, 169 (1980).

[5] Failure to add a specific reference to the 1974 Railroad Retirement Act in section 1003 of ERISA was understandable. ERISA was enacted six weeks before the Railroad Retirement Act of 1974. *See* P.L. 93-406, 83 Stat. 832 (1974); P.L. 93-445, 88 Stat. 1305 (1974). Section 1002(32) of ERISA listed only the 1935 and 1937 Railroad Retirement Acts because they were the only Railroad Retirement Acts then in existence. Conversely, the 1974 Railroad Retirement Act was omitted not because of a deliberate decision that plans under the 1974 Act were not to be exempt from ERISA, but simply because the 1974 Railroad Retirement Act was not yet law.

Nor is it surprising that the need to anticipate passage of the 1974 Railroad Retirement Act and include a specific reference to that Act in ERISA would be overlooked. As Judge Dorsey pointed out in the only



reported decision on the subject,[8] the 1974 Railroad Retirement Act "codified and absorbed and superseded the Railroad Retirement Acts of 1935 and 1937." *Cornelio v. Consolidated Rail Corp.*, 385 F.Supp. 490, 491 (D. Conn. 1984). Consequently, "[t]he 1935 and 1937 Acts do not now exist as pure and separate legislative acts. They were absorbed into the 1974 enactment and now constitute one statute." *Id.* at 493; *See also* Historical Note, Subchapter IV, Railroad Retirement Act of 1974, 45 U.S.C. §231. In this context, the need to identify the most recent version of what was legislatively regarded as a single railroad retirement program would not have been obvious. Moreover, if the original Railroad Retirement Act and its two revisions are regarded as distinct, and section 1002(32) is "taken literally," ERISA "would exempt plans under statutes no longer existent, but not plans under the only [Railroad Retirement Act] now in the United States Code," a result that would "attribute to Congress a legislative non sequitur without rational explanation." *Cornelio*, 385 F.Supp. at 491.

The statutory language does not explicitly bar a reading of section 1002(32) that excludes from ERISA retirement plans under the 1974 Railroad Retirement Act. In view of the continuing nature of the Railroad Retirement Act program, it is not unreasonable to emphasize the reference to "the Railroad Retirement Act" in section 1002(32), rather than the reference to particular revisions, especially in light of the additional reference to funding through contributions fixed by "that Act." This reference to funding characterizes plans under all three Railroad Retirement Acts. Furthermore, in the legislative history dealing with exemption provisions in ERISA, Congress made no distinction between the various Railroad Retirement Acts, simply noting that plans under a Railroad Retirement Act were exempt from ERISA's coverage. H.R. Rep. No. 533, 93rd Cong., 2nd Sess. *reprinted in* 1974 U.S.C.C.A.N. 4639, 4713; H.R. Conf. Rep. 1280, 93rd Cong., 2nd Sess, *reprinted in* 1974 U.S.C.C.A.N. 5038, 5043.

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[8]The absence of litigation may help explain the failure of Congress to amend §1002(32) of ERISA during the twenty years since it was adopted.

[6] Although admittedly not inescapable, a construction of section 1003 that exempts all Railroad Retirement Act plans accords with the clear purpose of Congress and avoids anomalous results.

## III.

## FELA

The district court granted defendants' Rule 12(b)(6) motion as to plaintiffs' FELA claims against Santa Fe Railway Company and Santa Fe Terminal Services for damages for work-related illnesses and injuries, holding that there can be no class actions under FELA as a matter of law. The court did not consider the propriety of class certification under Federal Rule of Civil Procedure 23.

[7] We know of no absolute legal bar to class certification of FELA claims.[9] The fact that the Employer's Liability Act, 45 U.S.C. §53, provides for reduction of damages in proportion to each employee's contributory negligence does not preclude class certification, though it may suggest certification is not desirable in some cases or that bifurcation may be required on the issue of damages. *See, e.g.*, Fed. R. Civ. P. 23(c)(4) (providing for partial class certification). The district court may well decide to deny class certification after analysis of the law and facts in light of the appropriate legal criteria, *see Nelsen v. King County*, 895 F.2d 1248, 1249 (9th Cir. 1990); *Price v. Lucky Stores, Inc.*, 501 F.2d 1177, 1179 (9th Cir. 1974), but it did not do so here. Instead, the court pre-empted consideration of the issue on an appropriate record by dismissing the FELA count under Rule 12(b)(6)

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[9] *McDonnell Douglas Corp. v. United States District Court*, 523 F.2d 1083, 1085-87 (9th Cir. 1975), merely held that certification was precluded under subdivisions (b)(1) and (b)(2) of Rule 23 for individual tort claimants seeking compensatory damages. As this court recognized in *In re Northern Dist. of California, Dalkon Shield IUD Prods. Liab. Litig.*, 693 F.2d 847, 852-56 (9th Cir. 1982), however, class treatment under subdivision (b)(3) may be proper for appropriately limited classes of tort plaintiffs.



before answer or discovery. This was improper. *Cf. Gillibeau v. City of Richmond*, 417 F.2d 426, 432 (9th Cir. 1969) (motion to dismiss for failure to state a claim is not a proper means of testing compliance with the pleading requirements of Rule 23).

IV.

Attorneys Fees

[8] The district court awarded Santa Fe Railway Company and Santa Fe Terminal Services attorneys fees against plaintiffs' attorneys under 28 U.S.C. §1927 for filing a premature notice of appeal. Fee awards under section 1927 must be based upon a finding that the attorney acted recklessly or in bad faith. *Estate of Blas v. Winkler*, 792 F.2d 858, 860 (9th Cir. 1986); *Lone Ranger Television, Inc. v. Program Radio Corp.*, 740 F.2d 718, 720 (9th Cir. 1984). The district court issued a tentative ruling denying fees on the ground that plaintiffs had acted mistakenly but neither recklessly nor in bad faith. The same day, at a hearing plaintiffs' counsel was unable to attend, the court granted the award. The court gave no explanation for its change of position and made no finding of recklessness or bad faith. Remand for appropriate findings is therefore required. *See Barnd v. City of Tacoma*, 664 F.2d 1339, 1343 (9th Cir. 1982). *Cf. Kanarek v. Hatch*, 827 F.2d 1389, 1390-91 (9th Cir. 1987) (district court's statements embodied implicit determination that motion had been submitted recklessly or in bad faith).

* * * *

Dismissal of the ERISA count is affirmed except as to the allegations with respect to Teamster pension benefits. Dismissal of the FELA claims is reversed and remanded for reconsideration of the propriety of class treatment. The award of attorneys fees is vacated and remanded for factual findings on the issue of recklessness or bad faith.



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**APPENDIX II — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, FILED APRIL 23, 1992**

Cause No. C 92-6623-WJR

UNITES STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

INTER-MODAL RAIL EMPLOYEES ASSOCIATION, et al.,

Plaintiffs,

vs.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, et al.,

Defendants.

**ORDER GRANTING DEFENDANTS' MOTION TO DISMISS**

The motion to dismiss the complaint brought by defendants The Atchison, Topeka and Santa Fe Railway Company, Santa Fe Terminal Services, Inc., and In-Terminal Services, Inc. came on, for hearing before this Court on April 5, 1993. Appearing as counsel for defendants Santa Fe Railway and Santa Fe Terminal Services, Inc. were Ronald W. Novotny and Craig J. Whitney of Hill, Farrer & Burrill; appearing as counsel for defendant In-Terminal Services, Inc. was Steven Yang of Keck, Mahin & Cate; and appearing as counsel for plaintiffs was Richard Schwartz.



*Appendix II*

Based on the record and pleadings on file herein, the argument of counsel, and for the reasons included in but not limited to the Court's tentative ruling on the motions, the Court hereby orders as follows:

(1) Defendants' motions to dismiss plaintiffs' first and third claims for relief are granted, with prejudice; and

(2) Defendants' motion to dismiss the class allegations in plaintiffs' second claim for relief under the Federal Employers' Liability Act (FELA) is granted. Plaintiffs shall have leave to file an amended complaint not later than May 5, 1993 alleging an FELA claim on behalf of the five named individual plaintiffs only.

IT IS SO ORDERED.

Dated: April 23, 1993

s/ William J. Rea
UNITED STATES DISTRICT JUDGE

**APPENDIX III — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DATED JUNE 24, 1996**

Not for Publication
United States Court Of Appeals
For The Ninth Circuit

No. 93-56400
D.C. No. CV-92-06623-WJR

Inter-Modal Rail Employees Association; Thomas Franks; Charles Jones; Thomas J. Martin; Hoyt Jarrard; Robert Stein,

Plaintiffs-Appellants,

v.

The Atchison, Topeka And Santa Fe Railway Company; In-Terminal Services, Division Of Mi-Jack Products, Inc., An Illinois Corp.,

Defendants-Appellees.

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No. 94-55188
D.C. No. CV-92-06623-WJR

Inter-Modal Rail Employees Association; Thomas Franks; Charles Jones; Thomas J. Martin; Hoyt Jarrard; Robert Stein,

Plaintiffs-Appellants,

v.

The Atchison, Topeka And Santa Fe Railway Company; Santa Fe Terminal Services, Inc.,

Defendants-Appellees.



*Appendix III*

Before: BROWNING and [illegible]EZER, Circuit Judges, and,* District Judge.

ORDER

The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for an en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

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* Honorable Ancer L. Haggerty, District Judge, United States District Court for the District of Oregon, sitting by designation.

**APPENDIX IV — COMPLAINT**
**FILED JULY 17, 1992**

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INTER-MODAL RAIL EMPLOYEES
ASSOCIATION, and, in the
alternative, THOMAS FRANKS,
CHARLES JONES, THOMAS MARTIN,
HOYT JARRARD, AND ROBERT STEIN

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

INTER-MODAL RAIL EMPLOYEES ASSOCIATION, a non-profit, mutual benefit California corporation, and, in the alternative, THOMAS FRANKS, CHARLES JONES, THOMAS MARTIN, HOYT JARRARD, AND ROBERT STEIN, being the directors of said Association, for themselves and as representatives of the affected class of persons, who are members of the plaintiff Association,

Plaintiffs,

vs.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, a Delaware corporation, SANTA FE TERMINAL SERVICES, INC., a Delaware corporation, SANTA FE PACIFIC CORPORATION, and IN-TERMINAL SERVICES DIVISION OF MI-JACK PRODUCTS, INC., an Illinois corporation,

Defendants.



*Appendix IV*

Cause No. C92-2808-MHP

Civil - Other Actions and Personal Injury

**COMPLAINT FOR DAMAGES AND JURY TRIAL**

1. Interference With Protected Rights In Violation of ERISA

2. Personal Injuries -- Federal Employers Liability Act

3. Retaliatory And Preemptive Discharge Relating To FELA Claims

Come now plaintiffs, and for their causes of action against defendants, state as follows:

1. On or about March 29, 1990, defendants and each of them wrongfully and intentionally caused employment loss, economic damages, personal injuries, and loss of health, welfare and pension benefits as well as Railroad Retirement Board benefits by discharging plaintiffs from their employment as drivers and cargo-handlers engaged in interstate commerce with defendant SANTA FE TERMINAL SERVICES, INC. ("SFTS"), in a railyard in the State of California operated and belonging to defendant THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY ("ATSF").

**JURISDICTION, VENUE, AND JURY DEMAND**

2. Count I of the Complaint arises under the Employee Retirement Income Security Act (ERISA), 29 U.S.C. §§1132 et seq., and more specifically under 29 U.S.C. §1140. Jurisdiction herein is proper under 28 U.S.C. §1331 on the First Cause of Action.

3. Counts II and III arise under the Federal Employers Liability

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Act (FELA), 45 U.S.C. §§51, et seq. Jurisdiction is proper in this Court under the Second and Third Causes of Action pursuant to 28 U.S.C. §1331 and 45 U.S.C. §56.

4. Venue in this Court is proper under 28 U.S.C. §1391(a).

5. Plaintiffs demand that all issues in this case be tried by a jury, in accordance with the Seventh Amendment to the U.S. Constitution and Rule 38(b) of the Federal Rules of Civil Procedure.

**THE PARTIES**

6. Plaintiff INTER-MODAL RAIL EMPLOYEES ASSOCIATION ("IMREA") is a non-profit mutual benefit corporation organized and existing under the laws of the State of California, which was formed for the purpose of and has been authorized to conduct this litigation on behalf of approximately 200 former employees of defendant SFTS who lost their employment as a result of the wrongful conduct of defendants leading up to and culminating on March 29, 1990.

7. Alternative plaintiff THOMAS FRANKS is the President of IMREA, and alternative plaintiffs CHARLES JONES, THOMAS MARTIN, HOYT JARRARD, and ROBERT STEIN comprise the remainder of its board of directors. Plaintiff IMREA represents herein, pursuant to irrevocable assignments and powers of attorney, the former railyard employees of defendant SFTS described above.

8. Defendant THE ATCHISON, TOPEKA AND SANTA FE RAILROAD ("ATSF") is a Delaware corporation with its principal place of business in Topeka, Kansas. At all times relevant hereto, defendant ATSF exercised day-to-day management and control over the affairs of its wholly owned subsidiary, defendant SFTS.

9. Defendant SANTA FE TERMINAL SERVICES, INC., is



*Appendix IV*

a Delaware corporation with its principal place of business formally in Chicago, Illinois. At this time, defendant SFTS is an inactive corporation. At all times relevant, defendant SFTS was a wholly-owned subsidiary corporation under the day-to-day management and control of defendant THE ATCHISON, TOPEKA AND SANTA FE RAILROAD ("ATSF").

10. Defendant SANTA FE PACIFIC CORPORATION ("SFP Corp.") is a Delaware corporation with its principal place of business in Illinois. At all times relevant hereto, defendant SANTA FE PACIFIC exercised day-to-day management control over the affairs of its wholly-owned subsidiary, defendant ATSF.

11. Defendant IN-TERMINAL SERVICES DIVISION OF MI-JACK PRODUCTS, INC. ("ITS"), is an Illinois corporation with its principal place of business in Illinois. Defendant MI-JACK Products resides in the City and County of San Francisco, State of California, at 210 Fell Street.

**ALTERNATIVE ALLEGATIONS AS TO PARTIES**

12. In the event that this Court should for any reason find that plaintiff IMREA is not a proper party to bring or to proceed with this action on behalf of its members and their spouses, then plaintiffs THOMAS FRANKS, CHARLES JONES, THOMAS MARTIN, HOYT JARRARD and ROBERT STEIN would seek to be certified as class representatives of the members of IMREA, each one similarly situated, and to proceed with this action on their behalf, namely all those 200 former SFTS employees and members of IMREA who were terminated from their employment by the wrongful actions of defendants leading up to and culminating on March 29, 1990. Class action certification would be then proper for the following reasons:

(a) the persons in this proposed class are so numerous that joinder of all of them is impracticable;

(b) disposition of the claims to be asserted herein by IMREA in a class action would be of benefit to the parties and to the Court in the event that this Court should at any time determine that plaintiff IMREA is not a proper party to conduct this litigation on behalf of its members and their spouses;

(c) the claims of the named plaintiffs are typical of the class. Members of the class consist entirely of former employees of SFTS and their spouses. All the proposed representatives of the class held blue-collar jobs and traditionally male positions in the same freight yard of defendant ATSF as drivers and cargo-handlers. Further, the jobs of all the proposed representatives of the affected class and the jobs of all members of the affected class are currently held by employees of defendant ITS pursuant to the below-described wrongful scheme entered into and effectuated by defendants to interfere with plaintiffs' rights to receive Railroad Retirement Board and Teamsters' pension benefits as well as health and welfare benefits, all as protected by 29 U.S.C. §1140, by discharging plaintiffs for the purpose of interfering with those rights;

(d) plaintiffs as class representatives will fairly and adequately represent the interests of the class; and

(e) there is a well-defined community of interest on the questions of law and fact presented by this case.

**FACTUAL BACKGROUND**

13. At all times prior to their discharge in March 1990, plaintiffs worked as employees of defendant SFTS at a railroad terminal, called the Hobart Yard, located in Los Angeles, California. Said railroad terminal was owned at all relevant times by defendant ATSF, and most



of the work in the Hobart Yard was performed by direct employees of ATSF.

14. The plaintiff class members include truck drivers and cargo handlers. They were hired to do intermodal work by defendant SFTS at the Hobart Yard, including ramp, de-ramp, and hostling, and had performed that work for a number of years prior to March 1990.

15. Defendant SFTS, a wholly-owned subsidiary of defendant ATSF, was formed for and its sole purpose was to do the loading and unloading work at the Hobart Yard. Defendant SFTS did that work from 1974 through March 1990.

16. At no time prior to January 1990 did a contract exist between defendants SFTS and ATSF for performance of ATSF's work at the Hobart Yard. At all times relevant, defendant SFTS' sole source of revenue was work for defendant ATSF.

17. In 1974, the Railroad Retirement Board found defendant SFTS to be an "employer" covered by the Railroad Retirement Act, 45 U.S.C. §§231 et seq. As such, defendant SFTS made contributions on behalf of each plaintiff to the Railroad Retirement Fund. Those employer contributions paid by defendants SFTS and indirectly by defendant ATSF totalled approximately $6,300 per employee per year. That level of contribution greatly exceeded that which non-railroad employers were required to contribute to the Social Security funds.

18. At all times relevant, defendant SANTA FE PACIFIC, the parent of defendant ATSF, sponsored an employee benefit program. Defendant SFTS, as an affiliated company of defendant SANTA FE PACIFIC, was part of the SANTA FE PACIFIC benefit program. All SFTS employees, including plaintiffs, were covered by the SANTA FE PACIFIC employee benefit program.

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19. As part of plaintiffs' benefits package during their employment with defendant SFTS, they received substantial contributions from their employer paid over to a Teamsters Union health and welfare benefit fund, a Teamsters pension fund, a Teamsters supplemental benefit trust fund, and to the Railroad Retirement Board. In addition, while employed by defendant SFTS, plaintiffs received substantial paid vacation time and sick leave pay.

20. In January 1990 a meeting was held between six members of plaintiff IMREA and members of the management of defendant SFTS. At that meeting, the SFTS management represented to the six employees who now belong to IMREA that defendant SANTA FE PACIFIC was spending millions of dollars to modernize the Hobart Yard, and to make it larger and more efficient so that more workers would need to be hired. Further, the management representatives from defendant SFTS represented to the six plaintiffs that their jobs were secure, and that they should tell their fellow employees about their job security and defendant SFP Corp.'s plan to make defendant SFTS the leading "piggy-back" and container hauler in the country. During said meeting, there was absolutely no mention that SFTS would go out of business just two months later, that its work would or might be taken over by defendant ITS, or that plaintiffs would lose substantial employment benefits when SFTS ceased operating at the Hobart Yard.

21. On or about January 1, 1990 defendant ATSF and defendant SFTS entered into a contract, termed a "Service Agreement", whereby defendant ATSF engaged defendant SFTS to perform the unloading and loading work at the Hobart Yard. This was the first time ever that a written contract was put into effect between defendant ATSF and SFTS for performance of the Hobart Yard work. During the previous two decades, defendant ATSF simply set up defendant SFTS and it then did all ATSF's intermodal work. Said 1990 contract provided that SFTS could be terminated in the event that defendant SFTS' services became "unsatisfactory" to ATSF. The contract otherwise had an indefinite duration.



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22. On February 22, 1990, less that two months after the contract was signed, defendant ATSF notified defendant SFTS that it was exercising its "right" to terminate the contract. No reason was given why the contract was terminated. Defendant ATSF, however, then invited defendant SFTS to submit a "bid" to perform the unloading and loading work at the Hobart Yard.

23. On February 23, 1990, defendant SFTS informed the Teamsters Union, representing plaintiffs herein, that its "customer" at the Hobart Yard, defendant ATSF, was or would be soliciting from other contractors bids for the work performed by SFTS at the Hobart Yard. SFTS told the Teamsters Union that it might "have to cease" operations at the Hobart Yard, and that all Teamsters Union positions, including those held by the members of plaintiff IMREA possibly could be abolished as of March 31, 1990. This was the first time that defendant ATSF ever raised the possibility that a company other than one of its wholly-owned subsidiaries would perform the intermodal work at the Hobart Yard.

24. On March 19, 1990 defendant ATSF informed defendant SFTS that it was not the successful "bidder" on the Hobart Yard contract. This occurred at least three days after defendant ITS had learned that it was the "successful bidder".

25. After defendant ITS was given the contract for the Hobart Yard work, defendant SFTS sold its Hobart Yard assets, including machinery and trucks, to ITS for a nominal sum on concessional credit terms.

26. On March 19, 1990 defendant ITS informed plaintiffs that ITS had been "awarded" the contract to operate the Hobart Yard facility on March 16, 1990. At that time, both ITS and defendant ATSF invited plaintiffs to apply for positions with ITS.

27. On March 29, 1990 defendant SFTS informed plaintiffs that as of March 31, 1990 they would be discharged from their employment.

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28. Some time after plaintiffs were informed by defendant ITS that it would take over operations at the Hobart Yard, plaintiffs were told by management personnel from defendants SFTS and ATSF that the reason why SFTS no longer was to operate the intermodal operations in ATSF's Hobart Yard was that it cost too much for "the railroad" to continue paying Railroad Retirement Board taxes and contributions for the plaintiffs' RRB benefits.

29. After their discharge by defendant SFTS, plaintiff FRANKS and many of the other members of plaintiff IMREA were hired by defendant ITS to do exactly the same work at the same place for the same railroad, defendant ATSF. But after ITS took over, it refused to continue to pay into the Railroad Retirement Fund on behalf of plaintiffs.

30. Upon their discharge by defendant SFTS in March 1990, plaintiffs lost vacation pay, their hourly wage rate was reduced, holidays and sick leave time were cut, they lost all employer contributions to the Railroad Retirement Board and their continued participation in the RRB system (and thus became eligible only for Social Security benefits), they lost job security and had to go through a probationary period of 30 days (even though many of the employees had been with SFTS for over ten years), and they suffered a reduction of contributions to and benefits from their pension plan and health and their welfare plan.

31. Defendant SFTS has admitted that the reason its contract to perform the work at the Hobart Yard was awarded to defendant ITS was for defendants SANTA FE PACIFIC and ATSF to avoid the higher wage costs paid to plaintiffs while they were employees of SFTS by the avoidance of payments to the Railroad Retirement Board on behalf of the members of plaintiff IMREA which it and defendant ATSF had made while they were employed by defendant SFTS.

32. On October 31, 1990 the Railroad Retirement Board found that defendant ITS was not an "employer" under the coverage of the Railroad



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Retirement Act 45 U.S.C. §§231, et seq. Therefore defendants SANTA FE PACIFIC, ITS and ATSF had avoided the requirement for ATSF to pay into the Railroad Retirement Fund on behalf of plaintiffs, by virtue of their having "awarded" the Hobart Yard intermodal contract to defendant ITS.

33. Some time prior to March 29, 1990 the defendants, and each of them, entered into a wrongful conspiracy to change the contract to perform ATSF's intermodal work at the Hobart Yard over to defendant ITS for the express purpose of avoiding payment of monies for RRB benefits into the Railroad Retirement Fund, and thus to avoid paying higher pension and health and welfare benefits to plaintiffs, all which had been required when plaintiffs were employees of defendant SFTS. Defendants had no legally justified reason to "award" the Hobart Yard contract to defendant ITS.

**FIRST CAUSE OF ACTION**
**(Interference With Protected Rights In Violation Of ERISA)**

34. Plaintiffs incorporate by this reference the allegations contained in Paragraphs 1 through 7 above.

35. From 1974 through March 1990, the members of plaintiff IMREA had a business and/or employment relationship or expectancy with defendant SFTS whereby they were legally entitled to and were receiving benefits in the form of salary, health insurance, pension, vacation days, sick leave, and holiday pay, as well as Railroad Retirement Act benefits. In addition, plaintiffs had a legitimate expectation of advancement and long-term continued employment with defendant SFTS.

36. At all times relevant to this cause of action, defendants ATSF, SANTA FE PACIFIC, and ITS had knowledge of plaintiffs' employment relationship and expectancy with defendant SFTS.

37. At some time prior to March 29, 1990, defendants, in violation of 29 U.S.C. §1140, agreed and conspired to intentionally interfere with plaintiffs' employment relationship and legitimate expectancy of continued employment for the express purpose of depriving plaintiffs of most, if not all of the substantial, ERISA-protected "fringe" benefits of their employment with SFTS, as alleged in the proceeding paragraphs.

38. The members of plaintiff IMREA who were hired later by defendant ITS received substantially lower ERISA-protected employment "fringe" benefits than what they had received when they were employed by defendant SFTS. In particular, defendants completely avoided charges to defendant ATSF for the making of contributions on behalf of plaintiffs to the Railroad Retirement Fund when they combined and conspired to discharge plaintiffs as SFTS employees and to bring in defendant ITS to perform the intermodal work at the Hobart Yard, all without any legal justification.

39. As a direct and proximate result of defendants' aforesaid actions in violation of 29 U.S.C. §1140, the members of plaintiff IMREA suffered the losses complained of in Paragraph 30 above by reason of which they are entitled to recover of the defendants consequential and liquidated damages.

40. The actions of defendants were willful, wanton, intentional, oppressive and outrageous, justifying the imposition of punitive damages in an amount sufficient to deter defendants and others from like conduct in the future.

**SECOND CAUSE OF ACTION**
**(Personal Injuries --**
**Federal Employers Liability Act)**

41. Plaintiffs incorporate by this reference the allegations contained in Paragraphs 1 through 40. This Second Cause of Action is against





defendants ATSF and SFTS only.

42. During the course of plaintiffs' employment with defendant SFTS, all or part of their duties were in furtherance of and did closely, directly and substantially affect defendant ATSF's and defendant SFTS' activities in interstate commerce, with the result that the rights and liabilities of the parties under this Second Cause of Action were and are governed by the Federal Employers Liability Act (FELA), 45 U.S.C. §§51, et seq.

43. During the course of their employment by defendant SFTS at defendant ATSF's Hobart Yard railroad loading and unloading facility, plaintiffs worked in the open air at the rail facility. In the course of said employment, plaintiffs were continually and repeatedly exposed to toxic chemicals from the open-air combustion of batteries and heavy metal components of batteries at the Gould Electronics Corporation business, located across the street from the Hobart Yard. To this day, those members of plaintiff IMREA who work at the Hobart Yard for defendant ITS continue to be exposed to toxic chemicals from that same source.

44. Furthermore, during the course of their employment at the Hobart Yard, plaintiffs were continually and repeatedly exposed to loud noises, harmful to humans, emanating from defendants ATSF's rail cars and switching operations, and from defendant SFTS' machinery and trucks located at the Hobart Yard job site. To this day, those plaintiffs who work at the Hobart Yard for defendant ITS continue to be exposed to dangerously high levels of noises.

45. At all times relevant, plaintiffs were unaware of the dangerous propensities of the loud noises to which they were exposed in the course of their employment at the Hobart Yard, and were unable to take any effective measures or actions to limit or to minimize any potential dangers caused by their exposure and/or proximity to said toxic chemicals and loud noises.

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46. Defendants SFTS and ATSF, by and through their duly authorized agents, servants and employees, were guilty of one or more of the following negligent acts or omissions in violation of the FELA, to wit:

(a) in failing to provide plaintiffs with a reasonably safe place within which to work;

(b) in failing to warn plaintiffs that they had been and continued to be exposed to toxic and harmful chemicals from the burning of batteries and heavy metal components across the street from their jobsite;

(c) to furnish plaintiffs with safe and suitable tools, ventilation equipment, protective clothing, eye and face protection, protective inhalation devices, and/or adequate noise filtering devices;

(d) in failing to warn plaintiffs of the precise, true nature and hazardous effects from their exposure to toxic chemicals and harmful substances resulting from the burning of batteries and heavy metal components in the course of their employment at the Hobart Yard, when defendants knew or should have known of such hazardous substances and effects;

(e) in failing to warn plaintiffs of the precise and true hazardous effects of exposure in the course of their employment to prolonged high noise levels when defendants knew or should have known of the hazards of same;

(f) in failing to provide instructions or a method for working around said toxic and harmful substances and around said harmful noise levels; and



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(g) in failing to monitor or test the worksite for the presence of loud noises harmful to humans and to test for toxic substances before and/or while requiring plaintiffs to work at the Hobart Yard.

47. That as a direct and proximate result, in whole or in part, of any one or more of the negligent acts pleaded in the foregoing Paragraph by defendants SFTS and ATSF, plaintiffs suffered loss of hearing by repeated exposure to very high noise levels.

48. As a further direct and proximate result, in whole or in part, of one or more of the foregoing negligent acts or omissions by defendants SFTS and ATSF, plaintiffs suffered exposure to toxic substances which caused them to sustain injuries to their skin, nervous system, psychological well-being, and internal organs, resulting in their impairment and disability, and creating the need for medical supervision, monitoring and treatment.

49. As a further direct and proximate result, in whole or in part, of one or more of defendants SFTS and ATSF's negligent acts set forth above, plaintiffs have suffered anxiety, post-traumatic stress disorder and/or post-traumatic depression, and they continue to suffer a well-founded belief or fear known as "cancerphobia" that they have or will contract some form(s) of cancer because of their toxic chemical exposures. As a further result of defendant SFTS and ATSF's acts or omissions, plaintiffs enjoyment of life and earning capacity have been reduced and their expected life-spans have been greatly shortened. As a further result of their health problems, plaintiffs will be forced to incur costly medical treatment and monitoring expenses in the future in their efforts to monitor and treat their condition, all in amounts as yet to be determined.

50. Before their exposures to the aforesaid hazards, plaintiffs were strong and able-bodied men and were at all times gainfully employed. As a result of the negligent acts or omissions of defendants ATSF and

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SFTS, plaintiffs have suffered damages by way of lost wages and/or diminished earning capacity, and diminished ability to render services, society, affection and counseling to their families.

**THIRD CAUSE OF ACTION**
**(Retaliatory And Preemptive**
**Discharge Relating To FELA Claims)**

51. Plaintiffs incorporate by this reference the allegations contained in Paragraphs 1 through 50 above.

52. A secondary motive of defendants' unlawful conspiracy to shift the "contract" for the intermodal work at the Hobart Yard from SFTS to ITS through the discharge of plaintiffs from their employment with SFTS, was for defendants SFTS and ATSF to limit their liability under the FELA for plaintiffs' hearing loss and damages from exposure to toxic chemicals.

53. Defendants feared that plaintiffs would make claims against defendant SFTS under FELA and wrongfully conspired to discharge plaintiffs from their employment with defendant SFTS so as to limit or evade their liability to plaintiffs under FELA because plaintiffs would no longer be covered under the FELA for personal injuries suffered during the course of their employment at the Hobart Yard rail facility. Defendants wrongful conspiracy to discharge plaintiffs from their employment with SFTS, and the shifting of plaintiffs' jobs to defendant ITS, an employer not covered under the FELA, was an attempt to leave plaintiffs only with state Workers' Compensation coverage as their sole remedy for personal injuries suffered in the course of their employment.

54. Those members of plaintiff IMREA who were hired by defendant ITS in April 1990 continue to suffer personal injuries resulting from exposure to high noise levels and to toxic chemicals up to the present, but because of their wrongful discharge from SFTS, they no longer are covered under the FELA.



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55. As a direct and proximate result of defendants' intentional, wrongful discharge of plaintiffs from their employment with defendant SFTS, plaintiffs were damaged as alleged in Paragraphs 30, 39 and 48-50 above.

56. The actions of defendants were willful, wanton, intentional, oppressive and outrageous, justifying the imposition of punitive damages in an amount sufficient to deter them and others from like conduct in the future.

WHEREFORE, plaintiff IMREA prays for judgment against defendants:

1. For general damages in amounts sufficient to fairly and adequately compensate the members of IMREA for all their consequential losses and for all their injuries; according to proof at trial.

2. For liquidated damages.

3. For punitive damages in an amount to be determined by the jury.

4. For prejudgment interest.

5. For reasonable attorneys' fees.

6. For their costs herein.

7. For such further relief as the Court deems just and proper.

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DATED: July 17, 1992

RICHARD SCHWARTZ &
ASSOCIATES, LTD.
s/Richard E. Schwartz
Richard E. Schwartz
James E. Parrot
Counsel for Plaintiffs



**APPENDIX V —AFFIDAVIT OF R. M. DUSHEK DATED SEPTEMBER 26, 1991**

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

No. CV 89-5905 KN (EX)

MARILYN MOSS,

Plaintiff,

vs.

SANTA FE PACIFIC CORP., ET AL.

Defendants.

**Affidavit of R. M. Dushek**

R. Dushek, being first duly sworn on oath, deposes and states as follows:

1. I am employed as President and Chief Operating Officer of Santa Fe Terminal Services, Inc. ("SFTSI"), a Defendant in this proceeding. I have held this position since January 1, 1990. From August 1, 1989 through December 31, 1989, I served continuously as Vice President of SFTSI.

2. As President of SFTSI, I am responsible for managing all operations of SFTSI, I also have access to all files and records maintained by SFTSI in the regular course of its business. The facts which I recite below are drawn either from my personal knowledge or my review of those files and records.

3. Per the order of this Court, attached to my Affidavit as Exhibits RMD-1 through RMD-4 are SFTSI's Balance Sheets for the dates

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December 31, 1988; December 31, 1989; December 31, 1990; and August 31, 1991. The Balance Sheets reflect, among other things, SFTSI's total assets, liabilities and shareholder's equity as of these four dates. Set forth below is a table summarizing the major aspects of the Balance Sheets, rounded to the nearest hundred thousand dollars:

| Date | Assets | Liabilities | Shareholder's Equity |
|---|---|---|---|
| Dec. 31, 1988 | $30.3 million | $13.2 million | $17.0 million |
| Dec. 31, 1989 | $20.3 million | $10.1 million | $10.1 million |
| Dec. 31, 1990 | $ 7.2 million | $ 3.1 million | $ 4.1 million |
| Aug. 31, 1991 | $ 5.0 million | $ 1.4 million | $ 3.5 million |

4. SFTSI's decrease in assets, liabilities and shareholder's equity as reflected above is due directly to its loss of major service contracts at Los Angeles, California (March 31, 1990); Richmond, California (June 30, 1990); and Chicago, Illinois (February 16, 1991). These contracts were lost by SFTSI in the ordinary course of business through a competitive bidding process.

5. The recent decline in SFTSI's business operations has nothing whatsoever to do with the filing or existence of the lawsuit filed against SFTSI by Plaintiff Moss. Rather, SFTSI has become unable to provide ramping and deramping services on as cost efficient a basis as its competitors. In my opinion, the two major reasons leading to SFTSI's loss of business at the three above-named locations were: (1) the higher wages SFTSI was required to pay its employees under applicable collective bargaining agreements; and (2) the Internal Revenue Service's requirement that SFTSI pay higher railroad retirement taxes, while its competitors operate under the social security system. Roughly, SFTSI under the railroad retirement- system is obligated to pay over $6,300 per year per employee more in retirement taxes than does its competitors under the social security system.



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6. I understand the Court has also ordered me to address whether SFTSI is in the process of selling or liquidating its assets. In instances where SFTSI loses a ramping/deramping contract, it routinely sells the assets used in performing a contract to the new contractor for fair market value. SFTSI had no affiliation whatsoever with the three separate entities that replaced it at Los Angeles, Richmond and Chicago.

SFTSI also leases truck trailers and containers on a very limited basis. SFTSI is currently attempting to sell such equipment for fair market value as opportunities arise.

7. Although SFTSI is not currently party to any contracts for ramping and deramping services, there is no intent to dissolve the corporation. In fact, SFTSI is party to a lawsuit against the IRS in which we seek a railroad retirement tax refund of approximately $20 million. If SFTSI prevails in this lawsuit, in my opinion it again will be able to bid on a competitive basis to, provide ramping and deramping services to railroads.

8. I also understand the Court has expressed concern over whether SFTSI would be able to satisfy any judgment awarded to its former employee Ms. Moss should she prevail in this litigation. While SFTSI is in a position to satisfy any award of damages to Ms. Moss up to at least $3.5 million (such amount being SFTSI's shareholder's equity as of August 31, 1991), SFTSI would consider posting a bond in a reasonable amount to guarantee the payment of any damages awarded Plaintiff Moss should the Court consider such a course of action neeessary.

FURTHER AFFIANT SAYETH NOT

s/R. H. Dushek

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Subscribed and Sworn to
before me this 26th day
of September, 1991.
s/R. E. Anderson
Notary

"Official Seal"
R.E. Anderson
Notary Public, State of Illinois
My Commission Expires 7/1/95

No. 96-491

(2)

Supreme Court, U.S.
FILED
OCT 28 1996
CLERK

In The

# Supreme Court of the United States

October Term, 1996

INTER-MODAL RAIL EMPLOYEES ASSOCIATION, THOMAS FRANKS, CHARLES JONES, TOMMY MARTIN, HOYT JARRARD, and ROBERT STEIN,

*Petitioners,*

*vs.*

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, SANTA FE TERMINAL SERVICES, INC. and IN-TERMINAL SERVICES, DIVISION OF MI-JACK PRODUCTS, INC.,

*Respondents.*

*On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit*

## RESPONDENTS' BRIEF IN OPPOSITION

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## QUESTIONS PRESENTED

1. Did the appellate court correctly decide that Petitioners cannot state a claim for interference with their non-vested health and welfare benefits in violation of Section 510 of ERISA, 29 U.S.C. § 1140, which prohibits only interference with the attainment of rights to which a participant "may become entitled" under a plan?

2. Did the appellate court correctly decide that the Railroad Retirement Act (RRA) of 1974 constitutes a "governmental plan" excluded from ERISA's coverage based on Congress' express exclusion of that statute's predecessor, the RRA of 1937, and its intent to exclude railroad retirement benefits generally from ERISA's scope?

3. Did this Court's recent decision in *UFCW v. Brown Group*, 116 S. Ct. 1529 (1996), rendered two months after the appellate court's decision in this case, so revise the law of "associational standing" that it conflicts with the appellate court's determination that the petitioner association lacks standing to sue for money damages on behalf of its members for alleged violations of ERISA and the Federal Employers' Liability Act? Does *Brown Group* now confer such standing on the association, even though Congress did not authorize such suits by an association under either ERISA or FELA and the claims asserted and relief requested necessarily would require the participation of each of the association's individual members in the lawsuit?

## LIST OF INTERESTED PARTIES

The parties to this proceeding are correctly identified in the Petition for Writ of Certiorari. In addition, pursuant to Supreme Court Rule 29.6, the Respondent corporations hereby identify their respective parent companies and non-wholly owned subsidiaries:

Respondent Santa Fe Pacific Corporation was not served with the complaint in this action and accordingly was not a party to the proceedings below. Nevertheless, its parent corporation is Burlington Northern Santa Fe Corporation, and it has no non-wholly owned subsidiaries.

Respondent The Atchison, Topeka and Santa Fe Railway Company's parent corporation is Santa Fe Pacific Corporation. Its non-wholly subsidiaries consist of Alameda Belt Line, Belt Railway Company of Chicago, Central California Traction Company, Houston Belt and Terminal Railway Company, Kansas City Terminal Railway Company, Oakland Terminal Railway, St. Joseph Terminal Railroad Company, Sunset Railroad Company, Texas City Terminal Railway Company, Wichita Union Railway Company, and TTX Company.

Respondent Santa Fe Terminal Services Inc.'s parent corporation is The Atchison, Topeka and Santa Fe Railway Company. It has no non-wholly owned subsidiaries.

Respondent In-Terminal Services, Inc.'s parent corporation is Lanco International. It has no non-wholly owned subsidiaries.



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## INTRODUCTION AND SUMMARY OF ARGUMENT

The petition fails to present compelling reasons for review by this Court within the meaning of Supreme Court Rule 10. For the reasons argued more fully below, the per curiam panel of the Ninth Circuit Court of Appeals properly held that Petitioners may not maintain a claim for relief for a violation of Section 510 of the Employee Retirement Income Security Act of 1974 ("ERISA") for interference with their non-vested health and welfare benefits because these are not benefits to which Petitioners "may become entitled" within the meaning of Section 510. The Court also correctly held that the Railroad Retirement Act of 1974 is a "governmental plan" exempt from ERISA's coverage, and that Petitioners cannot state a claim for relief for interference with their rights to receive railroad retirement benefits under ERISA. Lastly, the court below correctly concluded that Petitioner Inter-Modal Rail Employees Association does not have standing to prosecute this action on behalf of its members because the participation of each affected employee will be required. The petition for writ of certiorari should accordingly be denied in its entirety.

## STATEMENT OF THE CASE

This action arose out of a change in the employment of Petitioners' alleged members on March 31, 1990. Until that date, Respondent Santa Fe Terminal Services, Inc. ("SFTSI") was signatory to an agreement with Respondent The Atchison, Topeka and Santa Fe Railway Co. ("ATSF") to provide loading and unloading of "intermodal" trailers and containers on and off of rail flatcars at the Railway's "Hobart yard" rail terminal in Los Angeles. In early 1990, SFTSI was competitively outbid by another company, Respondent In-Terminal Services, Inc. ("ITS"), for a new service agreement. As a consequence, most of Petitioners' alleged members transferred their employment

from SFTSI to ITS effective April 1, 1990, and allegedly suffered a loss of employment benefits thereby.

Petitioners are the Inter-Modal Rail Employees Association ("IMREA") and five Teamster-represented employees who were hired by ITS as a result of the change in the independent contractors. In their first claim for relief, Petitioner IMREA alleges that the service agreement for intermodal freight hauling services between SFTSI and the Railway was canceled, and that its members' employment with SFTSI was terminated, for the purpose of avoiding the continued payment of railroad retirement taxes on their behalf. (*See* Complaint, ¶ 28).[1] Petitioners further allege that after they were hired by ITS, they suffered a reduction in contributions to, and benefits from, their Teamster-sponsored multi-employer pension and health and welfare plans, and that contributions on their behalf to the Railroad Retirement Board were eliminated. (Complaint, ¶ 30).

In their second claim for relief, Petitioners allege that they sustained personal injuries as a result of their exposure to loud noises and toxic chemicals at the Hobart rail terminal during their employment with SFTSI. (Complaint, ¶¶ 43-4). Petitioners further allege that as a result of the Respondents' negligence, they have suffered injuries to their skin, nervous systems, and psychological well-being, as well as "anxiety, post-traumatic stress disorder and depression," and "cancerphobia." (Complaint, ¶¶ 48-9).

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1. SFTSI paid railroad retirement taxes on behalf of its employees under the Railroad Retirement Act. ITS pays retirement taxes on behalf of its employees under the Federal Insurance Contribution (Social Security) Act, 26 U.S.C. § 3101, *et seq.* SFTSI and ITS are not related corporations or affiliated in any way.



## REASONS FOR DENYING THE WRIT

### I.

### THE PER CURIAM OPINION PROPERLY HELD THAT PETITIONERS DID NOT STATE A CLAIM UNDER ERISA FOR INTERFERENCE WITH THEIR RIGHT TO RECEIVE HEALTH AND WELFARE BENEFITS.

Petitioners' first claim for relief is based on an alleged violation of § 510 of ERISA, 29 U.S.C. § 1140. That section provides that:

> It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan, this title, Section 3001, or the Welfare and Pensions Plans Disclosure Act, or *for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan*, this title, or the Welfare and Pension Plans Disclosure Act.

(Emphasis provided).

Congress enacted Section 510 primarily to prevent employers from arbitrarily discharging employees whose pension rights are about to vest and from harassing employees in order to keep them from obtaining vested pension rights. *West v. Butler*, 621 F.2d 240, 245 (6th Cir. 1980). No Section 510 claim lies, however, where the alleged loss of such rights is

a mere consequence of, as opposed to a motivating factor behind, the termination. *Dytrt v. Mountain State Telephone and Telegraph Co.*, 921 F.2d 889, 896 (9th Cir. 1990).

The per curiam panel upheld the dismissal of Petitioners' Section 510 claim for interference with their non-vested welfare benefits based on the Ninth Circuit's prior decisions in *DeVoll v. Burdick Painting, Inc.*, 35 F.3d 408, 411 (9th Cir. 1994) and *Joanou v. Coca-Cola Co.*, 26 F.3d 96, 98 (9th Cir. 1994), which held that employers are legally free to unilaterally amend or eliminate medical, severance and similar kinds of non-vested welfare benefits which do not "vest" under the terms of ERISA. The panel reasoned that because employers "remain free to unilaterally amend or eliminate [health and welfare] plans without considering the employees' interests," no claim for "interference" with Petitioners' rights to receive further health and welfare benefits could be stated. *See* Per Curiam Opinion reported at 80 F.3d 348, 351 (Appendix I to Petition, pp. 8a-9a), *citing DeVoll, supra*, 35 F.3d at 411.

In reaching this conclusion, the Ninth Circuit also relied on its previous decision in *West v. Greyhound Corp.*, 813 F.2d 951, 955 (9th Cir. 1987), in which a Section 510 claim was rejected under remarkably similar circumstances. In *West*, a successor company failed to hire a number of unionized employees of its predecessor after the employees refused to work under a collective bargaining agreement which would have reduced their level of unaccrued welfare and unvested pension benefits. The Ninth Circuit specifically rejected the employees' claim that their termination, and the refusal of the successor corporation to hire them, violated Section 510. Recognizing the significance of the word "right" in Section 510, the *West* court stated:



> To qualify for relief under Section 1140 [510], the participant or beneficiary must show that he was exercising a "right to which he is entitled" or to which he "may become entitled." The [plaintiff employees] have failed to show any act of discrimination for asserting a right to which they were entitled or may become entitled under ERISA.... *The modifications suggested by [the successor] did not affect any accrued or vested rights owed to them by [the predecessor].*

*Id.* at 954 (emphasis provided).

Similarly, since SFTSI's employees had no right to any continued level of health and welfare benefits, or indeed to any health and welfare benefits at all, no actionable claim for a violation of Section 510 can be stated in this instance. ITS, which took over the intermodal contract through competitive bidding, was free through negotiations with the Teamsters Union to set any level of health and welfare benefits it desired, or to even eliminate them completely. *Bellingham Frozen Foods, Inc. v. NLRB*, 626 F.2d 674, 678 (9th Cir. 1980) ("a purchaser of assets is under no obligation to hire employees of a predecessor and is free to set the initial terms of employment for these employees should it decide to hire them"). The *West* court in fact recognized that Section 510 could not be used to thwart federal labor policy relating to business transfers:

> As an employee has no ERISA right to future, unaccrued benefits, he cannot claim discrimination because a purchaser of business assets will not hire him for insisting on unacceptable terms. If we were to hold

> otherwise, we would emasculate our holding in *Bellingham* that a new employer may set the terms of employment. *Bellingham*, 626 F.2d at 678.

*West v. Greyhound Corp., supra*, 813 F.2d at 955. Accordingly, if the new employer in *West* was free to refuse to hire the predecessor employer's employees at lower benefits, ITS was *a fortiori* legally privileged to hire Petitioners' members and to negotiate a new contract with their Union which allegedly altered their benefit package.

To this end, no court has ever held that a Section 510 claim can be established based on a mere reduction in employee benefits resulting from a lawful change in contractors such as that which occurred in this case. American businesses enter into and terminate service contracts every day for purely economic reasons, some having to do with labor costs, without running afoul of ERISA. To permit Petitioners to proceed with a Section 510 claim for "interference with" their non-vested welfare benefits would therefore be both unprecedented and contrary to settled law, and could potentially result in spurious ERISA claims brought by any employees who suffer a detrimental change in their health coverage as a result of a lawful change in subcontractors.

The Eleventh Circuit's opinion in *Seaman v. Arvida Realty Sales*, 985 F.2d 543, 546 (11th Cir. 1993), relied on by Petitioners, was properly rejected by the per curiam panel as an incorrect application of the law. The *Seaman* case ignored the critical language of Section 510, which requires that the participant have a "right" warranting protection under the statute in order to be able to state a Section 510 claim. The court below properly focused on the fact that in this instance the SFTSI employees had no "right," indefinite or otherwise, to



expect the same level of health and welfare benefits when and if they were rehired by ITS, and that no Section 510 claim could accordingly lie in this instance.

*Seaman* is also factually distinguishable. There, the employer terminated an employee for refusing to accept a change in status from employee to independent contractor, which would have resulted in her loss of health insurance benefits under circumstances in which all remaining employees would have continued to receive such benefits. If the plaintiff in *Seaman* had remained an employee, she would accordingly have continued to enjoy a "right" to receive such benefits. In contrast, Petitioners' members clearly had no "right" to any continued level of benefits following the termination of their employment with SFTSI.

Further distinguishing *Seaman* is the fact that any decrease in the level of Petitioners' welfare benefits in this case was merely the result of a change in contribution levels resulting from the give-and-take of labor negotiations between ITS and the Teamsters Union, as opposed to the kind of unilateral employer action eliminating an employee's eligibility for benefits that was involved in *Seaman*. In fact, the *Seaman* court expressly acknowledged that Section 510 does not prohibit employers from changing the terms of a plan and, like the Ninth Circuit, confirmed that employers may "modify non-vested benefits at any time." *Id.*, 985 F.2d at 547. That, of course, is all that Respondent ITS is alleged to have done after hiring Petitioners' members, by allegedly negotiating a lower employer contribution rate to Petitioners' Teamster-sponsored health and welfare plan than that which applied to their previous employer, SFTSI.

Petitioners' reliance on *Heath v. Varity Corp.*, 71 F.3d 256 (7th Cir. 1995) is also misplaced. In that case, the Seventh

Circuit merely decided that a Section 510 claim could be brought for interference with employees' early retirement benefits that were based on past service with the employer and to which some arguable future "right" existed. In fact, the district court in *Heath* appropriately characterized such benefits as "unaccrued benefits of vested employees." *Id.* at 256. Although the Seventh Circuit chose to characterize such benefits as "unvested" for the purpose of its decision, such benefits were clearly different in nature and kind from the health and welfare benefits at issue in this case, which SFTSI had the unqualified right to terminate as a matter of law. In fact, the Seventh Circuit has very recently concluded that early retirement benefits constitute "accrued benefits" within the meaning of Section 204(g) of ERISA, 29 U.S.C. § 1054(g), and are hence "rights" protected from elimination by plan amendment under the statute. *Ahng v. Allsteel, Inc.*, __F.3d __, 1996 U.S. App. Lexis 24970 (7th Cir. 1996).[2]

Significantly, the *Heath* case also dealt with an employee who was fired shortly before he was to become eligible for early retirement, which would have entitled him to additional pension benefits. In contrast, the Petitioners' members were clearly not legally entitled to the same level of health benefits with ITS that they enjoyed with SFTSI under the terms of any ERISA plan.

This Court's recent opinion in *Varity Corp. v. Howe*, 516 U.S. __, 134 L. Ed. 2d 130, 116 S. Ct. 1065 (1996) is also readily distinguishable and does not support Petitioners' position. There, the Court merely held that employees could sue their

2. In reaching its decision, the *Ahng* court acknowledged that other circuit courts also accord early retirement benefits protected status, including the Ninth Circuit. *Id.* at 24970, citing *Richardson v. Pension Plan of Bethlehem Steel*, 67 F.3d 1460, 1467-8 (9th Cir. 1995).



employer, as a plan administrator of various employee welfare benefit plans, for breach of its fiduciary responsibilities under ERISA when a loss of various welfare benefits was the result of a deliberate deception by the administrator regarding the availability of future benefits under the plan. More specifically, the Court determined that an action could be maintained under Section 502(a)(3) of the statute for breach of fiduciary obligations by the plan administrator in violation of Section 404 of ERISA.[3] The Court did not address whether such a claim could be maintained against non-administrators such as Respondents, nor did it generally hold that "employees may sue under ERISA for their right to receive health and welfare benefits" as Petitioners assert.

As Petitioners expressly concede, the issue of whether a Section 510 claim under ERISA can be brought for loss of welfare benefits was also not addressed by the *Varity* decision. (*See* Pet., p. 12). The *Varity* Court also did not even begin to decide whether a claim for interference with non-vested benefits could be asserted against a non-employer such as Santa Fe Railway in this instance, or whether such a claim could be made in the context of a mere alleged decline in employer contributions to a multi-employer benefit plan as opposed to the elimination of such benefits by a single employer as occurred in the *Varity* case. *Varity* is therefore completely inapposite to the case at bench.

3. Section 502(a)(3) of ERISA provides that a civil action may be brought by a participant or beneficiary to enjoin any act or practice which violates "any provision of this title or the terms of the plan," or to . . . "enforce any provisions of this title or the terms of the plan." Section 404(a) requires plan fiduciaries to administer the plan "solely in the interests of the participants and beneficiaries." Obviously, neither of these sections of the statute are in any way applicable to this action, in which no claim relating to the exercise of fiduciary duties or plan administration is at issue.

The foregoing factual dissimilarities between this case and those relied on by Petitioners readily demonstrate that there is no "real and embarrassing conflict of opinion and authority between courts of appeals" sufficient to justify the granting of certiorari. *NLRB v. Pittsburgh Steamship Co.* 340 U.S. 490, 502, 95 L. Ed. 479 (1951). This case is therefore not the appropriate vehicle to resolve any conflict which may exist between the circuit courts over whether a Section 510 claim can be stated for interference with non-vested welfare benefits under ERISA, and certiorari on this issue should be denied.

## II.

## THE COURT CORRECTLY CONCLUDED THAT THE 1974 RAILROAD RETIREMENT ACT IS A "GOVERNMENTAL PLAN" EXEMPT FROM ERISA.

Petitioners next assert that they may state a claim for violation of Section 510 based on Respondents' alleged "interference" with their railroad retirement benefits earned under the Railroad Retirement Act (RRA) of 1974. Petitioners base this argument entirely on the fact that ERISA does not expressly mention plans established pursuant to the 1974 RRA in its definition of "governmental plans" which are excluded from the statute's protection, even though it does mention that statute's predecessor, the RRA of 1937, which no longer exists. The per curiam panel properly rejected this argument, finding that the 1974 RRA was not included in ERISA's definitional provision when ERISA was enacted in 1974 because it was "not yet law" at that time. *See ibid.*, 80 F.3d at 352.

ERISA specifically exempts governmental plans such as those established under the Railroad Retirement Act from its operative effect. 29 U.S.C. § 1003(b)(1). "Governmental plans" are defined as plans established or maintained "for its



employees by the Government of the United States, by the government of any state or political subdivision, or by any agency or instrumentality of any of the foregoing," and specifically include "any plan to which the Railroad Retirement Act of 1935 or 1937 applies, and which is financed by contributions required under the Act." 29 U.S.C. § 1002(32). The Railroad Retirement Act (RRA) of 1974, 45 U.S.C. § 231, *et seq.*, clearly falls within this statutory definition of a governmental plan, as it is administered by the Railroad Retirement Board (an independent agency of the executive branch of the United States Government) and is maintained by the United States Treasury. *See* 45 U.S.C. §§ 231f(a),(b), and 231n(a).

In the only other reported decision on this issue, a district court unequivocally held that the Railroad Retirement Fund is exempt from ERISA's effect because it constitutes a "governmental plan" within the meaning of the statute. In *Cornelio v. Consolidated Rail Corp.*, 585 F. Supp. 490, 493-4 (D. Conn. 1984), the district court thus stated that:

> Clearly the RRAs [Railroad Retirement Acts] provide much of the protection that ERISA provided for private retirement plans and that the 1974 RRA was adopted six weeks after the enactment of ERISA without amending the reference in ERISA so as to exempt the 1974 RRA appears to be an oversight. The 1935 and 1937 Acts do not now exist as pure and separate legislative acts. *They were absorbed into the 1974 enactment and now constitute one statute.* Thus, ERISA's exemptions, if taken literally, *would exempt plans under statutes no longer existent but not plans under the only RRA now in the U.S. Code as such.*

*Id.* at 493 (emphasis provided). Concluding that the failure of Congress to amend ERISA to specifically include the 1974 Act thereafter was a "weak reed upon which to lean" and a "poor beacon to follow" in construing the statute, the *Cornelio* court thus determined that "no action involving a pension plan under the 1974 RRA can be brought under ERISA." *Id.* at 494.

Significantly, the *Cornelio* decision was based on a fully-informed analysis of the legislative history of ERISA and of Congress' intent to exclude governmental plans such as the 1974 RRA from its operative effect. Indeed, in reaching its conclusion, the *Cornelio* court cited legislative history specifically stating that the coverage requirements of the statute "do not apply to governmental plans (including Railroad Retirement Act plans)," without limiting *which* RRA plans were so exempted. *Id.* at 494, citing 1974 U.S. Code Congressional and Administrative News (U.S.C.C.A.N.) 5043.

Borrowing from Judge Dorsey's reasoning in the *Cornelio* case, the per curiam panel correctly decided that the exclusion of the RRA of 1974 from ERISA's coverage "is not precluded by the inadvertent failure to specifically identify the 1974 statute" in Section 1003 of ERISA. *Ibid.*, at 80 F.3d 348, at 353. This conclusion is inescapable because there is only one Railroad Retirement Act ("RRA"), the one amended in 1974 that is found at 45 U.S.C. § 231, *et seq.*, which superseded the 1935 and 1937 acts.[4] To conclude as Petitioners do that statutes

4. It is common to refer to acts by the year in which they were enacted. ERISA has been amended many times since it was enacted in 1974, yet it is still commonly referred to as the "Employee Retirement Income Security Act of 1974." *See, e.g., Mertens v. Hewitt Associates*, 508 U.S. 248, 124 L. Ed. 2d 61, 113 S. Ct. 2063, 2065 (1993). Likewise, the Securities Exchange Act of 1934 is still commonly referred to by that term even though it too has been amended many times. *See Gray v. First Winthrop Corp.*, 989 F.2d 1564, 1566 (9th Cir. 1993).



no longer existing are excluded from ERISA's coverage as "governmental plans," while the only RRA in existence is not, would thus be to "attribute to Congress a legislative non-sequitur without rational explanation," and hence improper. *Cornelio, supra*, 585 F. Supp. at 493.

Furthermore, and contrary to Petitioners' assertions, the 1974 amendments to the RRA gave no inkling of any intent to remove RRA plans from the government plan exception in ERISA. The amendments of 1974 did not alter the structure or administration of the RRA, which is subject to its own set of specific statutory regulations and strict administrative safeguards. *U.S. Retirement Board v. Fritz*, 449 U.S. 166, 177-78, 66 L. Ed. 2d 367, 101 S. Ct. 453, 459 (1980); 45 U.S.C. § 231n.[5] In addition, since it is administered by the government, the Railroad Retirement Plan was not viewed as vulnerable to many of the problems associated with private pension plans, thereby causing Congress to exempt the RRA from ERISA's coverage. As the per curiam panel noted:

> It is reasonable to assume plans under the 1935 and 1937 Railroad Retirement Acts were excluded from ERISA because such plans were already subject to independent federally administered statutory controls and were not plagued by the problems affecting private pension plans. This is equally true of plans adopted under the 1974 Railroad Retirement Act.

*Ibid.*, 80 F.3d at 351.

5. The purpose of the "restructuring" of the RRA in 1974 was to create a two-tier system of benefits to account for the inequities caused by dual eligibility under the RRA and the Social Security Act. *Fritz, supra*, 449 U.S. 166 at 177-78.

Petitioners further contend that Section 510 was intended to apply to claims for interference with Railroad Retirement benefits because Congress desired to specifically provide such protections to railroad workers. There is not one whit of legislative history or judicial authority to support this contention, however, and in fact the above-referenced legislative history manifestly requires a directly opposite conclusion. As the Ninth Circuit panel also properly noted, Congress "added to the financial stability of the Railroad Retirement Act plans and strengthened government controls over such plans" by enacting the 1974 RRA, thereby diminishing the need for the kind of added protections Petitioners contend that Congress somehow intended in enacting Section 510. (*Ibid.*, 80 F.3d at 352 (Petition, Appendix I, Opinion, p. 10a), citing *Fritz, supra*, 449 U.S. at 169 (1980) and 1974 U.S.C.C.A.N. 5702-14. Petitioners' "congressional intent" argument is therefore wholly specious.[6]

The Ninth Circuit therefore properly held that the 1974 RRA is exempt from ERISA's coverage as a "governmental plan," and that Petitioners may not proceed on their Section 510 claim alleging an intent to interfere with their railroad retirement benefits. Petitioners have presented no compelling reasons for review by this Court of that perfectly sensible statutory interpretation, thereby requiring that certiorari be denied in this issue as well.

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6. Petitioners' reliance on the dissenting opinion in *Varity Corp. v. Howe, supra*, in support of their argument that the "plain language" of ERISA controls in this instance is also most puzzling, given the fact that Justice Thomas was only one of three dissenting justices in that case and expressly characterized the Court's opinion in that matter as "quite limited." *Ibid.*, 116 S. Ct. at 1090.



## III.

## THE COURT OF APPEALS' DECISION IS ENTIRELY CONSISTENT WITH THIS COURT'S *HUNT* AND *BROWN GROUP* DECISIONS.

Finally, the petition seeks review of the Court of Appeals' holding that Petitioner IMREA lacked standing to bring this suit on its members' behalf, because "[t]o establish the individualized damages sought in both the ERISA and FELA claims, each employee member would have to participate in the lawsuit." (Pet., Appendix I, Opinion, p. 6a). As precedent for such holding, the Ninth Circuit cited its earlier decision, *United Union of Roofers, etc. v. Insurance Corp. Of America*, 919 F.2d 1398, 1400 (9th Cir. 1990), which held that a labor union lacked "associational standing" to bring a suit on behalf of certain of its members to recover unpaid wages under a payment bond because such claims necessarily involved individualized proof and thus individual participation of the union members. The *Roofers* court properly concluded that the suit did not meet the third prong of this Court's three-prong test for "associational standing" set out in *Hunt v. Washington State Apple Advertising Comm.*, 432 U.S. 333, 343, 53 L. Ed. 2d 383, 97 S. Ct. 2434 (1977), which requires that "neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit."

IMREA does not dispute the fact that the participation of its members in this lawsuit would be required to assess their individual damage claims, as the Ninth Circuit found. But IMREA contends that the court's "*sua sponte*" denial of standing on that ground conflicts with the decision rendered some two months later by this Court in *UFCW v. Brown Group*, 517 U.S. __, 134 L. Ed. 2d 758, 116 S. Ct. 1529 (1996), which

supposedly "revised the law of associational standing." (Pet., p. 14). There is no merit to this contention.

To begin with, it is immaterial that IMREA's lack of standing was raised by the Court of Appeals *sua sponte*. It is well settled that the issue of whether a plaintiff has proper standing may be raised on the court's own motion at any time, including on appeal. *See, e.g., National Org. For Women v. Scheidler,* 510 U.S. __, 127 L. Ed. 2d 99, 107, 114 S. Ct. 798 (1994) ["Standing represents a jurisdictional requirement which remains open to review at all stages of the litigation"]; *FW/PBS Inc. v. City of Dallas,* 493 U.S. 215, 229-232, 107 L. Ed. 2d 603, 110 S. Ct. 596 ["The federal courts are under an independent obligation to examine their own jurisdiction, and standing is perhaps the most important of [the jurisdictional] doctrines"].

Moreover, the Ninth Circuit's determination that IMREA lacks standing is not in conflict with this Court's *Brown Group* decision. In its attempt to argue otherwise, the petition completely misinterprets and misstates the actual holding and rationale of that case. There, the associational standing issue arose in the context of a suit brought by a labor union under the WARN Act (Worker Adjustment and Retraining Notification Act, 29 U.S.C. § 2101, *et seq.*), which expressly permits unions to sue employers for sixty days' back pay for affected members under certain specified conditions. This Court held that with respect to such claims, Congress abrogated the otherwise applicable third prong of the associational standing test under *Hunt* and was not precluded from doing so by Article III of the Constitution. The Opinion of the Court concluded that although the first two prongs of the test are grounded on the requirements of Article III, the third prong is not. Rather, it is a "judicially fashioned and prudentially imposed" limitation on



the exercise of federal jurisdiction which was "malleable by Congress." *Ibid.*, 134 L. Ed. 2d at 763, 766-771.

Unlike the WARN Act, neither ERISA nor FELA expressly authorize suits by labor unions or other associations of employees to seek money damages for individual members.[7] Accordingly, *Brown Group* clearly has no application to the instant case. Contrary to IMREA's claim, that decision did not in any way modify the general application of the third prong of the *Hunt* test in cases where Congress has not abrogated that limitation as it did in enacting the WARN Act. Clearly, the Court did not create a "new approach" to the third prong which will now require a case-by-case factual analysis by the district court, as IMREA apparently suggests. (Pet., pp. 16-17).

Hence, the fact that the complaint alleges that IMREA represents its members "pursuant to irrevocable assignments and powers of attorney" does not overcome the defect in IMREA's standing. (Pet., pp. 3, 14). Despite the conclusory characterization of the purported assignments as "irrevocable," the petition states that IMREA "will not keep any portion of the recovery it obtains for its members." (Pet., p. 17). Accordingly, unlike the health care provider in *Misic v. Building Service Emp. Health Plan,* 789 F.2d 1374 (9th Cir. 1986), cited in the petition, IMREA admits that it is not suing for its own benefit on claims which it actually owns, to recover money it would be entitled to keep by virtue of the so-called assignments. Rather, the assignments were merely a formalistic device, lacking any

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7. In this regard, ERISA allows for civil actions to be brought only by participants, beneficiaries, the Secretary of Labor, or a fiduciary, and does not permit suit by a plaintiff association. 29 U.S.C. § 1132 (a). The categories of potential plaintiffs set forth in the statute are exclusive. *Pressroom Unions etc. v. Con. Assurance Co.,* 700 F.2d 889, 893 (2d Cir. 1983). Likewise, the FELA limits suits to injured railroad workers. 45 U.S.C. § 51.

real substance, employed by IMREA in an attempt to circumvent the standing barrier erected by *Hunt's* third prong.

Additionally, the validity of the purported assignments would be based on state law, under which causes for personal injuries (such as the subject FELA claims) are non-assignable. *See Board of Trade of S.F. v. Swiss Credit Bank*, 728 F.2d 1241, 1242-3 (9th Cir. 1984); *Murphy v. Allstate Insurance Co.*, 17 Cal. 3d. 937, 942 (1976). Petitioners' Section 510 ERISA claim is also non-assignable, as it is akin to one for tortious wrongful discharge under state law.[8]

Finally, certiorari is not necessary to consider IMREA's contention that denial of its associational standing interferes with the First Amendment rights of its members. (Pet., pp. 14, 17-19). This constitutional argument was not raised below, and should not be considered by this Court for that reason. *Ellis v. Dixon*, 349 U.S. 458, 460, 99 L. Ed. 1231, 75 S. Ct. 850 (1955). Petitioners' argument is also unsupported by any applicable authority because it is patently meritless. This contention, if sustained, would require the virtual elimination of the third prong of the *Hunt* test — something even IMREA does not appear to advocate. That limitation on associational standing is necessary to preserve the orderly administration of justice and to protect IMREA's own members, for all of the reasons stated in *Brown Group* as to why *Hunt's* third prong was judicially created and retains its "value" even though the Court concluded it does not rest on Article III. *Ibid.*, 134 L. Ed. 2d at 769. Accordingly, the requirement that IMREA's members must themselves bring suit to recover their own money damages does

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8. The Ninth Circuit has held that a Section 510 claim is similar to a state law claim for wrongful discharge, which under California law sounds in tort. *Felton v. Unisource Corp.*, 940 F.2d 503, 512 (1991); *Gantt v. Sentry Insurance*, 1 Cal. 4th 1083, 1085-86 (1992).



not represent an unreasonable interference with their First Amendment rights.

## CONCLUSION

For all of the foregoing reasons, the petition should be denied in all respects.

Respectfully submitted,

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No. 96-491

In The

# Supreme Court of the United States

October Term, 1996

INTER-MODAL RAIL EMPLOYEES ASSOCIATION, THOMAS FRANKS, CHARLES JONES, TOMMY MARTIN, HOYT JARRARD, and ROBERT STEIN,

*Petitioners,*

*vs.*

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, SANTA FE TERMINAL SERVICES, INC., and IN-TERMINAL SERVICES, DIVISION OF MI-JACK PRODUCTS, INC.,

*Respondents.*

*On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit*

## BRIEF FOR PETITIONER

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## QUESTION PRESENTED FOR REVIEW

Do allegations by employee-beneficiaries of a health and welfare benefit plan that their employer's parent company forced their employer to discharge them and to contract out their jobs to another employer in furtherance of a conspiracy to interfere with their right to receive health and welfare benefits, state a cognizable cause of action under §510 of ERISA?

## LIST OF PARTIES TO PROCEEDING

Inter-Modal Rail Employees Association, and, in the alternative, Thomas Franks, Charles Jones, Tommy Martin, Hoyt Jarrard, and Robert Stein, filed this action against The Atchison, Topeka and Santa Fe Railway Company; Santa Fe Terminal Services, Inc.; Santa Fe Pacific Corporation; and In-Terminal Services Division of Mi-Jack Products, Inc.



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## CITATION TO LOWER COURT OPINIONS AND ORDERS

Court of Appeals: *Inter-Modal Rail Emp. Ass'n v. Atchison, Topeka*, 80 F.3d 348 (9th Cir. 1996), Case No. 93-56400.

District Court: no citations, Central District of California Case No. CV-92-06623-WJR.

## STATEMENT OF BASIS FOR JURISDICTION

The Court of Appeals entered its decision on March 27, 1996. A timely Petition for Rehearing and Suggestion for Hearing En Banc was filed. The Court of Appeals ordered Defendants to respond to that Petition. On June 24, 1996, the Court of Appeals denied the Petition and rejected the Suggestion for Rehearing En Banc.

Petitioners believe that 28 U.S.C. §1254(1) confers on this Court jurisdiction to review on a writ of certiorari the judgment of the Ninth Circuit.

## STATUTES INVOLVED IN THE CASE

29 U.S.C. §1002(1): The terms "employee welfare benefit plan" and "welfare plan" mean any plan, fund, or program ... established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits.

29 U.S.C. §1002(3): The term "employee benefit plan" or "plan" means an employee welfare benefit plan or an employee pension benefit plan or a plan which is both an employee welfare benefit plan and an employee pension benefit plan.

29 U.S.C. §1140: It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan, this subchapter, section 1201 of this title, or the Welfare and Pension Plans Disclosure Act, or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan, this subchapter, or the Welfare and Pension Plans Disclosure Act.

## STATEMENT OF THE CASE

This case presents first a constitutional issue of access to the Federal courts in the face of ERISA's comprehensive, reticulated scheme which has preempted all the relevant California state remedies; together with the issues of the proper construction of ERISA §510, the statute which created a Federal right to a remedy to replace those preempted, and the proper role of the Federal courts in statutory interpretation. Suit was filed by Inter-Modal Rail Employees Association ("IMREA") in the district court under federal question jurisdiction, 28 U.S.C. §1331. IMREA is a nonprofit mutual benefit corporation organized under California law by over 200 former employees. Its primary purposes are concerted political advocacy for workers' rights and the conduct of this litigation to advance such goals while seeking to recover lost pension and health and welfare benefits and other damages due to its members. IMREA holds the claims of its members pursuant to



assignments and powers of attorney (App. 3).[1] Once it has concluded the litigation IMREA is required by its by-laws and under the assignments and powers of attorney given to Petitioner Association by all of its members to pay over to them all benefits recovered, less stipulated attorneys' fees and litigation costs incurred.

Alternatively, the board of directors of Petitioner Association, comprised of five of these former employees, sought to be certified as class representatives of the Association's members in the event that any court might find it was not a proper party (App. 4-5). The directors and all other members of IMREA were Santa Fe Teamsters, specifically truck drivers, crane operators and cargo handlers who were involved in loading and unloading containers and trailers between railcars and trucks.

IMREA's first cause of action is under §510 of ERISA, 29 U.S.C. §1140. It alleged on behalf of its members that Respondent Atchison, Topeka & Santa Fe Railway (hereinafter "AT&SF" or "Santa Fe"), acting through its wholly owned subsidiary Respondent Santa Fe Terminal Services (hereinafter "SFTS" or collectively with AT&SF as "Respondents Santa Fe") and in conspiracy with Respondent In-Terminal Services Division (hereinafter "ITS"), interfered with these employees' rights to receive benefits under the Railroad Retirement Act (RRA) of 1974, 45 U.S.C. §§231, *et seq.*, and under the Teamsters Union pension and health and welfare plans (App. 10-13). IMREA also filed a claim on behalf of its members for damages under the Federal Employers Liability

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[1]All citations to the record before the appeals court are made as "App." Petitioner attached its Complaint to the petition for certiorari at Appendix IV.

Act (FELA), 45 U.S.C. §51, *et seq.* (App. 13-17). The court of appeals remanded this claim for further consideration on its suitability for class-action treatment.

Petitioner alleged that Respondents Santa Fe developed a scheme whereby AT&SF withdrew its so-called "contract" to perform inter-modal services at its Los Angeles railyard from its wholly owned subsidiary, Respondent SFTS which had been found to be a "railroad" employer under the RRA of 1974. In fact, AT&SF never before had used a contract between itself as parent and any subsidiary for performance of the inter-modal work. Less than two months after making this "new" contract, AT&SF canceled the contract and opened the work for "competitive bidding." Petitioner alleged that prior to its members' discharge Respondents conspired to "award" the contract to ITS with the understanding that ITS would reduce the amount of employee benefits payable for the railyard work (App. 9-11).

Respondents Santa Fe thus replaced themselves with Respondent ITS, a non-railroad employer, which then performed the same exact inter-modal work at the Santa Fe railyard using the same Santa Fe equipment and vehicles after hiring former Santa Fe employees who had been terminated the day before. Under their scheme, Respondents Santa Fe discharged all of the subsidiary's "railroad" employees, including the members of IMREA. The Association alleged that the purpose of this plan was illegal and violated ERISA since it was formulated and implemented with the specific intent to interfere with and deprive IMREA's members of their rights to receive pension benefits under the RRA of 1974 and to receive ERISA-protected retirement and health and welfare benefits under multi-employer plans of the Teamsters' Union (App. 6-13). Santa Fe's intent to escape payment of employee benefits, including contributions required by the Railroad



Retirement Board for "railroad" employees, was explicitly documented in a sworn declaration made by the president of the Santa Fe subsidiary (App. 59-62) (also attached to the petition for certiorari at Appendix V).

After AT&SF and SFTS discharged Petitioner's members for the purpose of interfering *inter alia* with their rights to receive health and welfare and retirement benefits, ITS rehired many but not all of the Santa Fe employees to do the same work at the same place with the same equipment, but those who remained were required to work for far lesser levels of employment benefits (App. 9-11).

## PROCEEDINGS BELOW

The district court granted Respondents' motion to dismiss Petitioner's complaint under Rule 12(b)(6) against each and every claim under §510 of ERISA for interference with the various employee benefits (App. 28-29). No Respondent filed an answer in the district court, and no party conducted discovery.

The *per curiam* opinion of a panel of the court of appeals first held that IMREA lacked standing to bring suit on the ERISA and FELA claims on its members' behalf. The court reasoned that "to establish the individualized damages sought in both the ERISA and FELA claims, each employee member would have to participate in the lawsuit." 80 F.3d 348, 350 (9th Cir.), *cert. granted*, 117 S.Ct. 504 (1996). This decision, of course, was made without the benefit of the Court's magisterial decision on associational standing, *UFCW v. Brown Group*, 116 S.Ct. 1529, 134 L.Ed.2d 758 (1996), entered shortly afterwards. The appeals court *sua sponte* had raised for the first time in its opinion any issue about the associational standing of IMREA. No Respondent had argued in the district court or at

the court of appeals that IMREA lacked associational standing. Thus, Petitioner never had an opportunity to present its constitutional views about the standing determination, i.e., that denying IMREA associational standing infringed on the members' rights of free association, speech, and petition, or about the other considerations which favored standing. This Court did not grant certiorari to examine this issue.

The appeals court reversed the district court's dismissal of the §510 claim against each Defendant for conspiracy to interfere with the employees' Teamster pension benefits. The Ninth Circuit found that "Plaintiffs clearly stated a claim under section 510 of ERISA, which 'protects plan participants from termination motivated by an employer's desire to prevent a pension from vesting.'" 80 F.3d at 350-51, quoting *Ingersoll-Rand v. McClendon*, 498 U.S. 133, 143, 111 S.Ct. 478, 112 L.Ed.2d 474 (1990). The Ninth Circuit also rejected Respondent In-Terminal Services' "argument that §510 does not support a cause of action against a non-employer for conspiring with an employer to interfere with ERISA-protected benefits." 80 F.3d at 350 n.5. No Respondent filed a cross-petition for certiorari on either of these issues.

The Ninth Circuit did, however, uphold the dismissal of the claims for interference with RRA pension benefits and with Teamster welfare health insurance benefits. *Id.* at 351-52. The appeals court found that, under its own decisions, claims under §510 for interference with the right to receive health and welfare benefits were not cognizable under ERISA since those benefits did not vest. *Id.* at 351. This was the point upon which the Court granted IMREA's petition for certiorari. Employees, it was rationalized, thus have no present right to receive such benefits. *Id.* The panel also rationalized that an employer may unilaterally amend or eliminate health and welfare insurance plans. *Id.* The appeals court recognized that its holding



conflicted with decisions of the Seventh and Eleventh Circuits. *Id.* at 351, n.6. Furthermore, the appeals court's opinion on this issue failed to consider this Court's decision in *Varity Corp. v. Howe*, 116 S.Ct. 1065, 134 L.Ed.2d 130 (1996), rendered shortly before this decision was announced. *Varity* upheld a claim under §404 of ERISA, 29 U.S.C. §1104, for breach of fiduciary duties by an employer who devised and implemented a scheme whereby its employees would transfer their employment to a new corporation, based on the employer's promises that the transfer would not affect their insurance benefits. In fact, that employer knew its new corporation would not remain in business because it was saddled with debt. The new corporation failed and the transferring employees lost all their health and welfare benefits. The Court held that §502(a)(3) of ERISA, 29 U.S.C. §1132(a)(3), authorized suits for equitable relief by each individual affected by the breaches of fiduciary duties. *Id.* at 1075-79.

In rejecting this Petitioner's claim under ERISA for interference with the right to receive benefits mandated by the RRA of 1974, the Ninth Circuit held that Congress "inadvertent[ly] fail[ed]" to include the 1974 RRA within the exemption from regulation for any "government plan." *Id.* at 351. Congress defined "government plan" in §3(32) of ERISA "to include any plan to which the Railroad Retirement Act of 1935 or 1937 applies". Thus, the appeals court's decision conflicted squarely with the plain language of the statute. Petitioner argued that the lower court ignored controlling precedents of the Court on legislative interpretation, such as *West Virginia Univ. Hosp. v. Casey*, 499 U.S. 83, 111 S.Ct. 1138, 113 L.Ed.2d 68 (1991) and *Massachusetts Mutual v. Russell*, 473 U.S. 134, 105 S.Ct. 3085, 87 L.Ed.2d 96 (1985). But the Court also declined to accept certiorari on this issue.

The Court granted certiorari only on Question Number Three raised by this Association's petition for writ of certiorari. The question specifically presented was,

> Do allegations by employee-beneficiaries of a health and welfare benefit plan that their employer's parent company forced their employer to discharge them and to contract out their jobs to another employer in furtherance of a conspiracy to interfere with their right to receive health and welfare benefits, state a cognizable cause of action under §510 of ERISA?[2]

## SUMMARY OF ARGUMENT

Petitioner Association has pleaded a cause of action under §510 of ERISA for interference with its members' right to receive health and welfare benefits under an employee benefit plan established as part of the collective bargaining agreement (CBA) between the Teamsters Union and various employers. Petitioner alleges that its members were wrongfully discharged from their employment with Respondents Santa Fe for the purpose of interfering with their right to receive health and welfare benefits under the CBA. Under the plain language of the statute and the persuasive Circuit court decisions, these allegations properly state a cause of action under §510 of ERISA.

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[2]Although the main focus of this brief is upon the specific language of the statute and the particulars of the ERISA jurisprudence, Petitioner contends that this case is fundamentally about access to the courts. *See infra* Argument at VI.



The clear language of §510 of ERISA prohibits discharges or other interferences with an employee's exercise of any right or with the attainment of any right under an "employee benefit plan." Congress defined the terms plan or employee benefit plan to include both pensions and health and welfare plans. 29 U.S.C. §1002(3). Therefore, no basis exists in the statutory language for the Ninth Circuit's interpretation of §510 to not protect employees from interferences with their right to receive health and welfare benefits, as well as pension benefits.

Congress repeatedly emphasized the broad remedial purposes of ERISA. The Ninth Circuit's interpretative shrinking of the protections afforded by §510 not only ignores the plain language of the statute but also contradicts Congress' intent behind ERISA.

In *Ingersoll-Rand v. McClendon* this Court recognized that an employee fired to prevent him from vesting in a pension had a claim under §510. Employees covered by a health and welfare plan have a present "right" to receive benefits provided they are employed and suffer a loss covered by the plan. Throughout the duration of their employment under the CBA those employees have a right to make claims for health insurance benefits. Respondents can cite to nothing in the record to support a claim that they legally could have modified or terminated health and welfare coverage for the members of Petitioner Association. The other Circuits uniformly hold that adverse employment actions which have the purpose of interfering with the right to receive non-vested health and welfare benefits are actionable under §510.

This Court's cases interpreting §8(a)(3) of the National Labor Relations Act (after which Congress modeled §510 of ERISA) establish that employers cannot subcontract out work for the purpose of interfering with employees' rights to

collectively bargain and organize. That is, an employer may not subcontract out work to a nonunion employer as soon as it learns that its employees intend to unionize. Likewise, employers like the Santa Fe Respondents cannot subcontract out the work performed by the members of Petitioner Association for the purpose of denying those employees benefits payable under the CBA and federal laws (including the Railroad Retirement Act).

Employees wrongfully discharged in violation of §510 may recover not only lost plan benefits but also back pay and front pay. Those latter items of recovery qualify as "other appropriate equitable relief" under §502(a)(3)(B) of ERISA. Under all other statutes prohibiting wrongful employment actions, Congress and this Court have recognized a right to recover back and front pay. This Court in *Ingersoll-Rand v. McClendon* stated that in a §510 action for interference with the employee's ability to vest in his pension, the relief requested -- damages for future lost wages, mental anguish and punitive damages -- was "well within the power of federal courts to provide."

The broad remedial purposes of ERISA recently confirmed by the Court in *Varity Corp. v. Howe* strongly counsel in favor of recognizing that wrongfully discharged employees should, at the very least, recover their lost wages. A court cannot make whole a terminated employee merely with an award of unpaid plan benefits under §510. Such a limited view of Congress' remedial intent does injustice to the statute and the employees it was intended to protect. Full restitution must be the proper measure of damages.

At the most fundamental level this case is about the denial of access to justice. The state-law remedies of the Petitioner's members were stripped from them by Congress in



its enactments of §510. The Court's preemption decisions have confirmed that involuntary, mandatory substitution of the Federal remedy. The *per curiam* decision of a panel of the court of appeals does violence to the ancient yet still vigorous doctrine that there exists a right to a remedy for every wrong.

## ARGUMENT

### I.

### THE APPLICABLE STANDARD OF REVIEW FAVORS PETITIONER'S PLEADING

The district court granted Respondents' motion to dismiss for failure to state a claim. The standard of review to determine the legal adequacy of the Complaint is familiar. The Court gives the Complaint its broadest intendment, and construes the allegations favorably to the pleader. The Court will not uphold a dismissal for failure to state a claim unless it determines with certainty that plaintiff cannot prove any set of facts to support the claim. *Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974). The principle question before the Court is whether Petitioner alleged a *prima facie* claim for wrongful discharge under §510 of ERISA. To reach this issue the circuit courts generally have analogized to claims under Title VII, 42 U.S.C. §2000e-2, and the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §623. The circuit courts have held that "to establish a *prima facie* case under ERISA §510, an employee must demonstrate (1) prohibited employer conduct (2) taken for the purpose of interfering (3) with the attainment of any right to which an employee may become entitled." *Gavalik v. Continental Can Co.*, 812 F.2d 834, 852 (3d. Cir.), *cert. denied*, 484 U.S. 979, 108 S.Ct. 495, 98 L.Ed.2d 492 (1987). *See, generally, Dister v. Continental Group, Inc.*, 859 F.2d 1108, 1112 (2d Cir. 1988).

At the pleading stage the other two steps in the Court's three-step analytical framework of shifting burdens and presumptions for wrongful discharge cases, *see McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-05, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973) and *Texas Dept. of Com. Affairs v. Burdine*, 450 U.S. 248, 252-53, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981), are not implicated. *See, e.g., Scheuer v. Rhodes, supra.*

## II.

## THE COURT'S PRECEDENTS ON STATUTORY INTERPRETATION AND THE CONSTITUTIONAL LIMITS ON A COURT IN CONSTRUING THE INTENT OF CONGRESS MANDATE REVERSAL OF THE NINTH CIRCUIT'S OPINION

To resolve the question here on review, the Court must interpret §510 of ERISA and discern the intent of Congress. *Dole v. United Steelworkers*, 494 U.S. 26, 35, 110 S.Ct. 929, 108 L.Ed.2d 23 (1990). To do so, the Court begins by looking at the language of the statute. *Id.*, and *Varity*, 116 S.Ct. at 1085 (Thomas, J., dissenting) ("in every case involving construction of a statute, the starting point is the language itself") (internal quotations omitted). If Congress plainly and unambiguously has drafted a statute, the Court need look no further. *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 240-41, 109 S.Ct. 1026, 103 L.Ed.2d 290 (1989) ("where, as here, the statute's language is plain, 'the sole function of the court is to enforce it according to its terms'"). The courts have a duty to "give effect, if possible, to every clause and word of a statute." *Moskal v. United States*, 498 U.S. 103, 109-10, 111 S.Ct. 461, 112 L.Ed.2d 449 (1990). The Court's cases "express a deep reluctance to interpret a statutory provision so as to render superfluous other provisions of the same enactment." *Pa. Dept. of Pub. Welfare v. Davenport*, 495 U.S. 552, 562, 110 S.Ct. 2126, 109 L.Ed.2d 588 (1990) and *Varity*, 116 S.Ct. at 1082 (Thomas, J., dissenting) ("courts should disfavor interpretations of statutes that render language superfluous").



Only if the statutory phrase is ambiguous should the Court look beyond the statute's language and examine the legislative history. *Ron Pair Enterprises*, 489 U.S. at 242. If the Court cannot determine Congress' intent from the legislative history, then the Court employs traditional rules of statutory construction. *Dole*, 494 U.S. at 36.

The Court is bound to recognize and effectuate Congress' intent where it is clear from the words of the statute. Courts must presume that "a legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253-54, 112 S.Ct. 1146, 117 L.Ed.2d 391 (1990). Such is the case here. Congress spoke plainly, but the opinion below turned a deaf ear to its plain language.

The courts are not permitted to assume that Congress inadvertently omitted a particular portion of a statute. *Massachusetts Mutual*, 473 U.S. at 143 (finding the "assumption of an inadvertent omission" in ERISA "especially suspect"), *cited in Varity*, 116 S.Ct. at 1082 (Thomas, J., dissenting). And courts may not interfere with the language Congress chose by supplying omitted phrases. *West Virg. Univ. Hosp.*, 499 U.S. at 101 ("what [respondent] asks is not a construction of a statute, but, in effect, an enlargement of it by the court, so that what was omitted, presumably by inadvertence, may be included within its scope. To supply omissions [in a statute] transcends the judicial function") (quoting Brandeis, J.).

## III.

## THE LANGUAGE OF THE STATUTE IS UNAMBIGUOUS AND PETITIONER'S CLAIM IS AN UNEMBELLISHED APPLICATION OF THE STATUTE'S PLAIN TERMS

Section 510 of ERISA, 29 U.S.C. §1140, reads exactly as follows:

> It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan, this subchapter, section 1201 of this title, or the Welfare and Pension Plans Disclosure Act, or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan, this subchapter, or the Welfare and Pension Plans Disclosure Act.

29 U.S.C. §1140. In light of the Congressional definitions of the terms "employee benefit plan" and "plan" to include health and welfare plans, discussed *infra*, the conduct prohibited by the terms of §510 seems quite obvious, or, at a minimum, not so murky as to serve as a breeding ground for any mysteries about intent.

Petitioner submits that its claims and those of its members present a straightforward application of §510. By its own terms the statute prohibits firing employees for exercising plan rights or to prevent employees from "attain[ing]" rights under a plan. In its Complaint, Petitioner alleges that



Respondents conspired to discharge its members from the employment with Respondent SFTS for the purpose of lowering the amount of health and welfare and retirement benefits that they would receive. By its clear terms set out above §510 of ERISA prohibits —

> "any person" from taking various actions,
>
> including the "discharge" of a "participant,"
>
> either for "exercising any right under the provision of an employee benefit plan," or
>
> "for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan."

### A. The Clear Language Of §510 Shows That It Prohibits Discharges From Employment For The Purpose Of Interfering With Health And Welfare Benefits

The Ninth Circuit found that despite the broad wording of §510 it did not apply to discharging employees for the purpose of interfering with the attainment of benefits under a health and welfare insurance plan since those benefits are not vested. 80 F.3d at 351. The statute does not contain any such limitation. Should it have desired to do so, Congress could have limited §510 to interferences with benefits that had vested or would vest, such as pension plans.[3] Instead, Congress chose to draft §510 with specific words to prohibit interferences with

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[3]Congress defined in §3(A) of ERISA, 29 U.S.C. §1002(2)(A), the terms "employee pension plans" and "pension plans".

any "employee benefit plan" or "plan." Congress defined employee benefit plan and plan to include:

> an employee welfare plan or an employee pension benefit plan or a plan which is both an employee welfare benefit plan and an employee pension benefit plan.

ERISA §3(3), 29 U.S.C. §1002(3). *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 90, 103 S.Ct. 2890, 77 L.Ed.2d 490 (1983).[4] To rationalize the Ninth Circuit's conclusion, this Court would have to decide to supply an "omission" into the statute. I.e., the Court would have to legislate in the missing language limiting interference actions to employers' interferences with pension benefits only. Courts do injustice to the separation of powers set out in Articles I and III of the Constitution by impermissibly acting as a super-legislature when supplying terms to limit the reach or scope of a broadly worded remedial statute. This Court has never done so. Indeed, the Court has stated that it is "reluctant to tamper with an enforcement scheme crafted with such evident care as the one in ERISA." *Massachusetts Mutual*, 473 U.S. at 147.

Moreover, the language of §510 makes clear that Congress intended to prohibit interferences with vested and non-vested

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[4]In pertinent part, Congress defined the terms "employee welfare benefit plan" and "welfare plan" to include "any plan, fund, or program ... established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits." ERISA §3(1), 29 U.S.C. §1002(1).



benefits. The statute first proscribes actions against a participant or beneficiary "for exercising any right to which he is entitled" under a plan. The plain language of that phrase means rights which the participant presently enjoys. For example, injured employees have a present contractual right to make claims for health insurance benefits under their employee welfare benefit plan. *See Owens v. Storehouse, Inc.*, 984 F.2d 394, 398 (11th Cir. 1993) ("employer may contractually bind itself to provide fixed medical benefits"). Likewise, participants presently vested in a pension plan have a right to claim pension benefits provided they meet the eligibility requirements. By virtue of their status as employees under their union contract up till the day of their discharge, Petitioner's members had the right to make hospital and other healthcare benefits claims under the Teamsters' health and welfare plan to which their employer was a signatory.

Section 510 in its second clause expressly prohibits acts undertaken "for the purpose of interfering with the *attainment* of any right to which such participant *may become entitled* under the plan" (emphasis added) as well as the acts prohibited by the first clause. The highlighted portions of the second clause permit no reasonable inference other than that the statute prohibits interference with the attainment of future employee benefits, particularly when read together with the first clause which speaks of benefits in the present tense.[5] Employees

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[5]In another context, this Court has indicated that the word "may" means "contingency or liability, or possibility or probability". *U.S. v. Lexington Mill*, 232 U.S. 399, 411, 34 S.Ct. 337, 58 L.Ed. 658 (1914). Webster's defines the word "become", in one of its meanings, as "to pass from one state to another; to enter into some state or condition, by a change from another state or condition, or by assuming or receiving new properties or qualities, additional matter, or a

covered by a collective bargaining agreement ("CBA") which has a specific termination date possess an expectancy (contractual right) to make claims for health and welfare benefits, at least for the duration of their employment under the CBA, when they or their family members suffer a covered injury. Here, the CBA would not have expired for another full year, until March 31, 1991. Petitioner's members were discharged on March 31, 1990. Prior to their discharge, these employees had a future right to "attain" health and welfare benefits, that is, to make claims under those plans if they or their family suffered a covered injury, at least until March 31, 1991. Moreover, the Ninth Circuit's focus upon "vested" benefits as the only ones protected, 80 F.3d at 350-51, is patently contradicted by the plain language of the second clause of §510 with its usage of such future-oriented words as "attainment" and "may become entitled".

Neither elemental logic nor the history of this legislation nor the experience of 20-plus years of employers and employees operating under this law permits a distinction between discharges which prevent pension benefits from vesting and discharges that prevent employees from making claims for health and welfare benefits under a CBA. An employee who does not yet qualify because of years of service and age for vested status in his/her pension does not have a present "right" to make a claim for pension benefits. In *Ingersoll-Rand* this Court found that "[b]y its terms, §510 protects plan participants from termination motivated by an employer's desire to prevent a pension from vesting." 498 U.S. at 143. *See also Hazen Paper Co. v. Biggins*, 507 U.S. 604, 612, 113 S.Ct. 1701, 123 L.Ed.2d 338 (1993) (same). As best we can discern,

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new character..., to come into being". *Webster's New Universal Unabridged Dictionary* p. 164 (2d ed. 1983).



nowhere in the legislative history of ERISA did Congress indicate that it desired to limit the remedial scope of §510 to interferences with the right to receive or attain pension benefits that will vest at some date, but simultaneously to exclude future health benefits. But our National legislature did specifically state that §510 will prevent an employer from discharging an employee "to interfere with attainment of vested benefits or other rights under the bill...." *See Gavalik*, 812 F.2d at 852, n.32, *citing* S. Rep. No. 127, 93d Cong., 1st Sess. at p.35 (1973), *reprinted in* 1 Legislative History of the Employment Retirement Income Security Act of 1974 (Senate Committee Print, hereinafter "Leg. Hist.") at 621-22, and Senate Floor Debates, 2 Leg. Hist. at 1641 and 1811, 3 Leg. Hist. at 4745. Chief Judge Higginbotham in *Gavalik* wrote that a broad protective purpose for §510 "is supported by the legislative history which envisions preventive, as well as corrective, purposes of the provision." *Id.* at 856. Absolutely nothing in the legislative record suggests that Congress intended the language of §510 to permit an employer to discharge employees who enjoyed a contractual right to obtain health and welfare benefits for a defined period in order to force them to accept lower levels of health and welfare benefits.[6] So the Ninth Circuit's artificial distinction between health and welfare benefits and pensions, 80 F.3d at 350-51, is a judicially-created anomaly at variance with the plain language of the statute and the obvious intent of Congress.

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[6]Senate Report No. 93-127, p.14, 93d Cong., 1st Sess., broadly states that "no person can interfere with or discriminate against a participant with respect to rights and privileges which such person is entitled to under the plan, Act or the WPPDA." 1 Leg. Hist. at 600. *See also* H. Rep. No. 93-533, p.17, 93d. Cong., 1st Sess., 2 Leg. Hist. at 2364 and Conf. Rep. No. 93-1280, p.330-31, 93d Cong., 2d Sess., 3 Leg. Hist. at 4597.

Respondents may answer that because ERISA does not "generally" limit an employer's ability to modify or terminate employee health insurance benefits, *see Curtiss-Wright Corp. v. Schoonejongen*, 115 S.Ct. 1223, 1228, 131 L.Ed.2d 94 (1995), an employer can fire its employees to achieve the same result. If one were to suppose that the Ninth Circuit tacitly has adopted the automaticity of this misleading syllogism, at least one could discern some intellectual principle underlying its decision. Petitioner respectfully contends that the panel's logic was flawed. Congress has spoken cogently and plainly to the contrary. Petitioner recognizes that ERISA does not limit an employer's ability to modify or terminate employee health insurance.[7] But in light of Congress' clear prohibition in §510 against an employer terminating its employees to achieve a different level of health and welfare benefits, the inescapable resolution of the seeming paradox must be that the right to change (or even to end) benefits does not extend to the freedom to engage in prohibited employment practices against

[7]*Curtiss-Wright* does not hold that employers may ignore contractual limitations on their ability to modify or terminate health and welfare benefits. Indeed, some of the circuit courts of appeal have recognized that employers and employees, usually through union representation, may agree that the employer cannot modify health and welfare benefits for the duration of the CBA, thus "vesting" such benefits for that time period. *Golden v. Kelsey-Hayes Co.*, 73 F.3d 648, 655 (6th Cir.), *cert. denied*, 117 S.Ct. 49, 136 L.Ed.2d 13 (1996) and *Anderson v. Alpha Portland Indust.*, 836 F.2d 1512, 1516-17 (8th Cir.), *cert. denied*, 489 U.S. 1051, 109 S.Ct. 1310, 103 L.Ed.2d 579 (1989) (noting that Congress took a "neutral position" on the issue of welfare benefit vesting, and that "we must determine whether 'the parties intended [that] retirees' benefits would be vested and not tied to the agreement which created them'").



employees to achieve such a change. It is one thing to say an employer can modify or terminate an employee health insurance plan. But it would be wholly an unprincipled excursion to find that Congress intended that employers have freedom to terminate employees in order to achieve lower health and welfare benefits.[8]

This Court has had little occasion to interpret §510. Petitioner submits the *leitmotif* must be access to the courts to remedy unjust employment actions taken to interfere with plan benefits. In the context of a breach of fiduciary duty claim under §404, the Court held last term that an employer and its controlling parent corporation violated fiduciary duties by lying to their employees about the financial health of a new corporation and the safety of their health insurance benefits for the purpose of inducing the employees to transfer to the new corporation. *Varity Corp.*, 116 S.Ct. at 1068-69. At the time they made those misrepresentations, the employer there knew that the new corporation would fail and that its employees

[8]In *Heath v. Varity Corp.*, 71 F.3d 256, 258 (7th Cir. 1995), the court found no real contradiction between an employer's freedom to modify health and welfare benefits not contractually guaranteed for a specific term and §510's prohibition against discharges to effectuate that end: "That employers won a battle and secured the right to modify plans, while employees prevailed in a different skirmish and secured the right to qualify for benefits under existing plans, shows no more than that each side could claim some victories. It upsets the legislative balance to push the outcome farther in either direction." The circuit court held that an employee, already vested for future retirement benefits, could sue under §510 for his employer having discharged him to prevent him from obtaining eligibility for early retirement benefits (nonvested).

would lose both their jobs and their health insurance benefits. Just one year after the employer had fraudulently induced its employees' transfer, the new company failed and the employees lost their health insurance benefits and jobs. *Id.* *See also id.* at 1074: "[t]o participate knowingly and significantly in deceiving a plan's beneficiaries in order to save the employer money at the beneficiaries' expense, is not to act solely in the interest of the participants and beneficiaries". The majority of the Justices of this Court in *Varity* broadly interpreted ERISA's remedial section to provide wronged employees with a direct remedy under that statute when their employer bilked them of welfare and health benefits. The Court found that

> ERISA's basic purposes favor a reading of the third subsection [§1132(a)(3)] that provides the plaintiffs with a remedy. The statute itself says that it seeks "to protect ... the interests of participants ... and ... beneficiaries ... by establishing standards of conduct, responsibility, and obligation for fiduciaries ... and ... providing for appropriate remedies ... and *ready access to the Federal courts*".

*Id.* at 1078 (emphasis added). The Court held that the employees' claim for individual relief existed by virtue of §502(a)(3) of ERISA, providing for the recovery of "other appropriate equitable relief," 29 U.S.C. §1132(a)(3).[9] But under the circuit court's *per curiam* interpretation of ERISA, employees have no access to a Federal court to obtain a remedy

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[9]The district court in *Varity* had ordered that the employees be reinstated into the Massey Ferguson health and welfare plan, and ordered payment of "certain monetary relief" that was not at issue before the Court. 116 S.Ct. at 1069.



for any wrongful interference, no matter how intentional in its origin or malicious in its impact, with their contractual right to receive health and welfare benefits set out in a CBA. That conflicts with the specific intent of ERISA as interpreted by the majority of this Court in *Varity*. Paradoxically, the circuit court's decision here also clashes with the motivating principles of the dissenting justices in *Varity* who adhered to the magisterial principles of Justice Scalia in *West Virginia University Hospitals* concerning "plain language" interpretation of Congressional intent. 116 S.Ct. at 1081-82, 1085-86 (Thomas, J., dissenting). *Varity* stands for the rule that employees may sue under ERISA for wrongful interference with the right to receive health and welfare benefits, although the Court did not precisely address there the question presented here. But the court of appeals held that such benefits are beyond the reach of an ERISA §510 interference action. The opinion below reached a perverse result as a matter of responsible public policy, and it did so for a perverse reason under principles of statutory construction. The circuit court's scanty reasoning and cavalier approach simultaneously offend the holdings and the motivating principles of both the majority and the dissent in *Varity*.

Respondents can present no principled argument for denying access to the courts for employees who sue directly under §510 for their wrongful discharge motivated by an intent to interfere with their health and welfare benefits. Under the Court's finding in *Varity* employees have a claim for breach of fiduciary duties for inducing them to transfer to a failing company when their employers' preordained benefits loss occurs a year later. Here, the employer and its co-conspirators did not even reach for the fig leaf of delaying the loss of benefits. The point is access to justice whether the affected employees seek to redeem the preempted state rights that would have been available to them under common-law trust or tort

theories. The *Varity* majority found that Congress intended to prohibit employer conduct that wrongfully interferes with the right to receive health and welfare benefits. Petitioner submits that in drafting §510 ("it shall be unlawful for any person to discharge ... a participant for exercising any right ... or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan") Congress plainly intended to more forcefully state its opposition to such interference than in the more generally worded prohibition against breaches of fiduciary duties in §404(a) (requiring a fiduciary to "discharge his duties with respect to a plan solely in the interests of the participants").

It requires little effort to discern valid policy reasons why Congress preferred to require that employers negotiate with their employees (or representatives) about reductions in health and welfare benefits (where a CBA guarantees payment of benefits for a specific time), or simply unilaterally reduce their workers' benefits (if no contract guaranteeing nonmodifiable benefits is in force), rather than to promote mass discharges or employers resorting to termination of their employees to achieve that result. Promoting workplace stability and job security is such a valid policy goal. So is stability in the personal lives of workers who labor for such benefits. So are, most especially, the avoidance of labor unrest and labor-market disruptions.

This Court has noted that in drafting ERISA, Congress "repeatedly emphasized [its] purpose [was] to protect contractually defined benefits." *Massachusetts Mutual*, 473 U.S. at 148 and n.16. In *Shaw*, 463 U.S. at 90, this Court described ERISA as "a comprehensive statute designed to promote the interests of employees and their beneficiaries in employee benefit plans." It would hardly serve Congress' purpose and design to permit employers – such as Respondents



Santa Fe – to engage in mass discharges of their employees through sham "contracts" to force upon them lesser health and welfare benefits than those required under an existing contract.

Central to the Court's decision in *Varity* was the recognition that Congress intended ERISA to "'provide both the Secretary and participants and beneficiaries with *broad remedies* for redressing or preventing violations of [ERISA].'" 116 S.Ct. at 1078, *citing* Senate and House Reports on ERISA, *reprinted at*, 1 Leg. Hist. at 621 and 2 Leg. Hist. at 2364 (1976) (emphasis added). In *Varity* Justice Breyer posed magisterially rhetorical questions focusing on why and how the Court might find, in light of the legislative history and the language of the statute, that Congress intended to restrict access to justice or to deny to employees a remedy for employers' actions that wrongfully deprive health insurance benefits. 116 S.Ct. at 1077. The Court resoundingly found that no such limitation existed. "We are not aware of any ERISA-related purpose that denial of a remedy would serve." *Id.* at 1079. Even more so in this case, there can be found no tenable ground to hold that Congress intended to deny access to justice.

In *Ingersoll-Rand* the Court noted that ERISA

> sets various uniform standards, including rules concerning reporting, disclosure, and fiduciary responsibility, *for both pension and welfare plans*. As part of this closely integrated regulatory system Congress included various safeguards to preclude abuse and "to completely secure the rights and expectations brought into being by this landmark reform legislation" *Prominent among these safeguards* are three provisions of particular relevance to this case: ... §510, which proscribes interference with *rights protected by ERISA*.

498 U.S. at 137 (emphasis added, citations omitted). If the Court had believed that §510 did not apply to interference with health and welfare benefits it presumably would not have employed such sweeping preemption language with any qualification or reservation. *Id.* at 138-40. The Court there appropriately could have noted the existence of such a distinction limiting access in the statute. But the Court cited to the broad range of its ERISA-preemption jurisprudence, including *Pilot Life v. Dedeaux*, 481 U.S. 41, 107 S.Ct. 1549, 95 L.Ed.2d 39 (1987) without distinction as to type of benefits sought. The Court in *Ingersoll-Rand* went on to note the importance to Congress of §510: "Congress viewed this section as a crucial part of ERISA because, without it, employers would be able to circumvent the provision of promised benefits." 498 U.S. at 143 (citations omitted).

Here Petitioner alleged that, at least through the duration of the National Master Freight Agreement (NMFA), its members' employer had promised to make contributions to the Teamsters Health and Welfare Fund at certain levels (Writ Pet. App. IV at p.26a, ¶19 and p.29a, ¶35). Petitioner further alleged that, as part of their scheme to deprive the members of health and welfare (and retirement benefits), Respondents conspired to deprive them of those benefits by discharging Petitioner's members from their employment and entering a sham contract with Respondent ITS to hire the same employees to do the same work at the same location with the same equipment, but at lesser benefits levels (*id.* at p.26a-30a).[10] Thus, Petitioner

[10]Although the question of legitimate reason for the mass discharge of Petitioner's members is not before the Court at the pleading stage, the facts that Respondent ITS hired the employees of Respondents Santa Fe to do the same work at the same place with the same equipment but with significantly lesser health and welfare and pension benefits strongly suggests an illegal motive for the discharge from employment with Respondents Santa Fe.



alleged that this conspiracy was formulated and implemented for the purpose of, and did in fact circumvent the provision of promised benefits. Its allegations clearly fall under the intent of §510 as expressed by Congress and this Court.

### B. The Interpretations Of The Congressional Intent Underlying §510 Found By Several Other Circuit Courts Of Appeals In Construing §510 Likewise Support Reversal

The Ninth Circuit appears to be the only court of appeals to have held that a discharge for the purpose of interfering with the right to receive what the court of appeals deemed "non-vested" health and welfare benefits is not actionable under §510.[11] The Ninth Circuit noted that its ruling conflicted with at least two other circuits, 80 F.3d at 350 n.6. No other circuit court of appeal has arrogated to itself so much legislative power, nor

[11]Petitioner does not concede that their right to receive health and welfare benefits was unvested. It strongly contests the relevance of the Ninth Circuit's "vesting" inquiry. It contends that "vesting" in this context is an analytically unsound method of inquiry. The evidence may prove that SFTS and AT&SF had no right under the applicable CBA's to modify or terminate contributions to the health and welfare benefits enjoyed by Petitioner. In that event, the health and welfare benefits probably could be considered to have vested for the term of the CBA's. *See Adcox v. Teledyne, Inc.*, 21 F.3d 1381, 1389 (6th Cir.), *cert. denied*, 115 S.Ct. 193, 130 L.Ed.2d 126 (1995) ("'under certain circumstances,' employee welfare plan benefits may vest contractually").

gone as far as to wholly deny access to the Federal courts to a major category of §510 litigants. One can read all the circuit court decisions interpreting §510 but this one in harmony, provided one focuses on their holdings concerning access under and the intended function of §510 without addressing collateral issues. The holding of this panel is the irredeemable anomaly which must be overruled to expunge its potentially corrosive effect upon the courts, not to speak of its impact upon the general public.

The question in a §510 action is not whether the employer has a right to modify benefits levels or wholly eliminate a health and welfare plan. Rather, the proper inquiry must be, did the employer discriminate against or otherwise alter the employment relationship for the purpose of interfering with ERISA-protected employment benefits? Thus, where a legitimately motivated employer sells its business to an unrelated company, or closes its plant for *bona fide* business reasons, or modifies its health and welfare plan for legitimate economic reasons with no intent to discriminate, the prohibitions of §510 are not implicated.[12] When, however, an

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[12]*See West v. Greyhound Corp.*, 813 F.2d 951 (9th Cir. 1987) (sale of business), *Adcox v. Teledyne, supra*, 21 F.3d 1381 (plant closing), and *Owens v. Storehouse, Inc.*, *supra*, 984 F.2d 394 (plan modification). The holding in *West* that the seller of a business was not liable under §510 for interfering with health and welfare benefits because up to the date of employment termination the employer had paid all benefits claims, 813 F.2d at 955, ignores the second part of §510, which prohibits discharges "for the purpose of interfering with *the attainment* or any right to which such participant *may become entitled* under the plan..." (emphasis added). The second holding in *West* -- that the purchaser of the business was free not to hire the former employees at the



employer discharges its employees for the purpose of interfering with health and welfare benefits, the employees may bring suit under §510. In this case, Petitioner alleged not a plan termination or modification, but rather that Respondents conspired to discharge them to avoid paying health and welfare and pension benefits at the higher level. This important distinction is crucial to construing §510 as valid in its plain terms within the context of a comprehensive, reticulated statute. Access to justice in the case of the illegally motivated conspiracy pleaded by Petitioner should be redeemed by the Court.

In *Kross v. Western Electric Co.*, 701 F.2d 1238 (7th Cir. 1983), the former employees brought a class action under §510 alleging that their employer discharged them "to avoid continuing to make payment for [their] company-provided life and medical insurance." The employer responded that it discharged the class members as part of a workforce reduction due to reduced demand for its products. *Id.* at 1239. Finding that insurance coverage for medical expenses incurred was a "right" under the insurance plans, the Seventh Circuit upheld access to the Federal courts for the employees. The *Kross* court found "no support" in the case law or ERISA's legislative history for narrowly reading §510 so that it did not cover a discharge for the purpose of interfering with insurance benefits:

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prior level of benefits -- does not control the allegations in this case of an illegal conspiracy between the "new subcontractor" employer, Respondent ITS, and the contracting company, Respondent AT&SF. No actual statutory "conflict" is presented by the distinction between a legitimate purchaser's right to hire whomever it pleases and holding liable under §510 co-conspirators motivated by an illegal motive to reduce ERISA-protected employment benefits guaranteed under an existing CBA.

> In light of the fact that ERISA is a remedial statute to be liberally construed in favor of employee benefit fund participants, we find no support for the district court's conclusion that since [the employees] "[were] already ... participant[s] in the insurance plans, [they were] not prevented from attaining rights under the plan".

*Id.* at 1242. The *Kross* court supported its interpretation of the Congressional intent with a quote from a House Report which declared that underlying ERISA was a

> recognition of the necessity for a comprehensive legislative program dealing not only with malfeasance and maladministration in the plans, ... but also with the broad spectrum of questions such as ... plant shut downs and plan terminations....

*Id., quoting* H.Rep. No. 533, p.9-10, 93d Cong., 2d Sess., reprinted in 2 Leg. Hist. at 2356-75.

In *Seaman v. Arvida Realty Sales*, 985 F.2d 543 (11th Cir.), *cert. denied*, 510 U.S. 916, 114 S.Ct. 308, 126 L.Ed.2d 255 (1993), the employer had first requested that the employee convert her job status to that of an independent contractor so that the employer could thus eliminate the cost of providing her non-vested health insurance and contributions to a 401(k) plan. When she refused to change her status, she was fired. That court held that the employee stated a claim under §510 of ERISA.[13] The Eleventh Circuit found that

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[13]Other circuits have upheld §510 wrongful discharge claims where the employee alleges that the termination was to prevent accrual and assertion of claims under employee health insurance plans. *Fleming v. Ayers &*



> [t]he validity of a §510 claim does not hinge upon whether the benefits involved are vested but upon the purpose of the discharge. ... [Section] 510 prohibits employers from preventing an employee from taking advantage of a plan or from applying a plan in a discriminatory manner.

*Id.* at 546-47.[14] The *Seaman* court noted that although it "may appear anomalous" to permit an employer to reduce or terminate non-vested benefits while prohibiting an employment termination to avoid paying benefits, the structure of ERISA and its history "reveals that it is the result intended by Congress." *Id.* at 546. The court reasoned that by providing participants with the right to recover "benefits due to him under the terms of the plan," §502(a)(1)(B), "Congress intended for the employer to be bound by the terms of its plan." *Id.* at 547. *See also Stiltner*, 74 F.3d at 1484 ("Congress has determined, by enacting ERISA §510, that once an employer elects to include certain benefits within its employment package, it cannot revoke them with the intent to deter employees from asserting their rights under ERISA").

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*Assoc.*, 948 F.2d 993, 998 (6th Cir. 1991) and *Fitzgerald v. Codex Corp.*, 882 F.2d 586, 589 (1st Cir. 1989).

[14]"[T]he legislative history ... indicates that the purpose of §510's anti-retaliation provision was to prevent employers who maintain ERISA plans from using economic leverage to intimidate participants and beneficiaries under those plans from exercising their ERISA given rights to enforce the plans' terms." *Stiltner v. Beretta USA Corp.*, 74 F.3d 1473, 1489 (4th Cir. *en banc*), *cert. denied*, 117 S.Ct. 54, 136 L.Ed.2d 18 (1996) (Phillips, J., concurring and dissenting with four other judges).

In *Deeming v. American Standard, Inc.*, 905 F.2d 1124, 1127 (7th Cir. 1990), the court found that an employer's decision to officially terminate its employees at a plant closing rather than permitting them to remain on "layoff status" and thereby to accrue time to qualify for pension benefits, violated §510: "It is clear from the text of the statute, however, that §510 was designed to protect the employment relationship against actions designed to interfere with, or discriminate against, the attainment of a pension right." *See also Heath v. Varity Corp.*, *supra*, 71 F.3d 256, where the Seventh Circuit found actionable under §510 interference with non-vested benefits (early retirement for employees already vested in the pension plan) through discharge from employment.

In *Conkwright v. Westinghouse Elec. Corp.*, 933 F.2d 231, 236 (4th Cir. 1991), the court held that §510 prohibits an employer acting to prevent the accrual of additional benefits by an employee already vested. That court notably and properly rejected the vested-nonvested benefits dichotomy favored by Respondents and the Ninth Circuit:

> Surely, Congress was not limiting §510 only to those rights which a participant acquires upon vesting, or it easily could have referred to "vested rights". Similarly, the statute refers to rights to which a participant "may become entitled", which is to say that *§510 permits suits for interfering with rights not yet earned.*

*Id.* at 237 (emphasis supplied).

If Congress had enacted ERISA with any intent to exclude from actions under §510 some or any types of interference with the right to receive health and welfare benefits, or for that matter any other non-vested benefits, it could have so stated so in the comprehensive, reticulated language of the statute, or at



least in the legislative history. If this Court had believed that there was any likelihood at all that health and welfare benefits were intended by Congress to be excluded from the sweep of §510, then it would appear only reasonable that the Court for Ninth or Tenth Amendment reasons would not have applied its complete preemption analysis in *Ingersoll-Rand*, *supra*, 498 U.S. at 138-40. Neither the circuit court below nor Respondents cited any provision of the statute or its history which compels such a narrow reading of its broad language. Indeed, by its plain language §510 expressly prohibits employers from discharging employees

> for exercising any right to which he is entitled under the provisions of an *employee benefit plan* ... or for the purpose of interfering with the *attainment* of any right to which such participant *may become entitled* under *the plan.*

(emphasis added). The Ninth Circuit's *per curiam* opinion thus conflicts with the clear language of the statute, the teachings of *Casey* and *Varity*, and the holdings of at least six of the other circuit courts of appeal - the First, Third, Fourth, Sixth, Seventh and Eleventh Circuits.

## IV.

## THE COURT'S PRECEDENTS INTERPRETING CONGRESS' PROHIBITIONS AGAINST UNLAWFUL EMPLOYMENT PRACTICES UNDER OTHER STATUTES GOVERNING LABOR AND EMPLOYMENT RELATIONS COUNSEL REVERSAL OF THE DECISION BELOW

In a broader labor relations context, the Court has declared the illegality of an employer subcontracting out parts of its work

or moving its business to another location ("runaway shop") for the purpose of discriminating against its employees or interfering with their rights to organize and collectively bargain.[15] Such otherwise arguably legal conduct becomes illegal because of the employer's improper motive, and such actions violate §8(a)(1) and (3) of the National Labor Relations Act (NLRA), 29 U.S.C. §158. *See Textile Workers v. Darlington Manufacturing Co.*, 380 U.S. 263, 274, 85 S.Ct. 994, 13 L.Ed.2d 827 (1965). An employer violates §8(a) of the NLRA by unilaterally changing the terms and conditions of employment, including health insurance benefits governed by existing CBA's. *See Allied Chemical Workers v. Pittsburg Plate & Glass Co.*, 404 U.S. 157, 159, 92 S.Ct. 383, 30 L.Ed.2d 341 (1971). It appears likely that such a concern may have motivated Respondents Santa Fe to construct their sham arrangement with Respondent ITS which gave rise to this case. Finally, a successor employer (even a new owner) cannot refuse to hire a predecessor's employees solely because they belonged to a union or to avoid recognition of the union. *See Howard Johnson's, Inc. v. Hotel & Rest. Employees and Bartenders Union*, 417 U.S. 249, 262 n.8, 94 S.Ct. 2236, 41 L.Ed.2d 46 (1974).

The cases cited above are all examples of how otherwise proper actions by an employer have been declared illegal by Congress, and found by the Court to result in liability because

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[15]"The legislative history of ERISA §510 does make clear, however, that the statute was modeled on §8(a)(3) of the National Labor Relations Act (NLRA)." *Stiltner*, 74 F.3d at 1483 (citing 2 Legis. Hist. at 1775). The NLRA and cases construing it thus may guide the Court in its interpretation of §510 of ERISA. *See generally Cannon v. Univ. of Chicago*, 441 U.S. 677, 694-701, 99 S.Ct. 1946, 60 L.Ed.2d 560 (1979).



of illegality of the underlying motivations for those employer behaviors. The analogy of such holdings to the litigation brought by Petitioner IMREA is virtually perfect. Indeed, this Petitioner's case is more compelling than one involving only an illegal motive. Respondents Santa Fe subjected these employees to the most drastic of personnel practices – discharge. Respondents because of their illegal benefit-defeating motive have chosen to engage in prohibited employment practices against this entire group of discharged employees in order to obtain quickly a result they might otherwise have achieved more slowly but legally. This focus upon an employer's conduct and motivation pervades the jurisprudence of labor relations. *See, for example, Lingle v. Norge Division of Magic Chef*, 486 U.S. 399, 108 S.Ct. 1877, 100 L.Ed.2d 410 (1988). The specifics of this employer conduct and motivation compel liability against the Respondents.

Petitioner alleged that "[a]t all times relevant hereto, defendant AT&SF exercised day-to-day management and control over the affairs of its wholly owned subsidiary, defendant SFTS" (Writ. App. IV at p.22a, ¶8). Petitioner further alleged that its members' nominal employer, SFTS, "was formed for and its sole purpose was to do the loading and unloading work" at Respondent AT&SF's Los Angeles railyard (*id.* at p.25a, ¶15). For two decades no contract existed between Respondents AT&SF and SFTS to do that work. But in an effort to "legitimize" this unlawful conspiracy a sham contract was formed between the parent and its subsidiary. Less than two months later, AT&SF "terminated" the SFTS contract and opened the work for "competitive" bidding. Respondent ITS then "underbid" SFTS by agreeing with AT&SF to substantially reduce all employment benefits, including health and welfare

and retirement benefits (*id.* at p.27a-30a).[16] After AT&SF and SFTS fired all the members of Petitioner Association, ITS rehired most of them to do the same work in the same place with the same equipment but at lower benefit levels (*id.* at p.28a, ¶29). Thus, if Petitioner can establish that AT&SF's contract with ITS was motivated by an intent to interfere with ERISA-protected benefits set out in the applicable CBA's, then its members should be held to have stated a viable claim under §510. In contrast, if the Court should fail to reverse here, the Ninth Circuit opinion will create major dissonance with the Court's precedents mentioned herein and Congress' overall scheme for labor relations conducted through collective bargaining.

## V.

## THE RELIEF PROVIDED TO PETITIONER'S MEMBERS IN THIS ACTION UNDER ERISA FOR WRONGFUL DISCHARGE MUST AFFORD COMPLETE RESTITUTION TO QUALIFY AS THE "APPROPRIATE EQUITABLE RELIEF" REQUIRED BY THE STATUTE

Fairly within the scope of the question posed in the question on which petition for certiorari was granted, and therefore properly before the Court, *Varity*, 116 S.Ct. at 1070, is the issue of the type of relief available in this action to enforce violations

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[16]Because ITS was not a "railroad" employer, it did not have to make contributions to the Railroad Retirement Fund. That resulted in a savings to Respondent AT&SF of over $6,000 per employee per year, representing the excess amount a railroad employer contributed over a non-railroad employer's contributions to Social Security (Writ App. V at p.38a-39a).



of §510. In *Ingersoll-Rand* the Court found that in light of the broad pre-emptive force of §514 of ERISA, 29 U.S.C. §1144, an employee wrongfully discharged for the purpose of preventing him from attaining vested status for his pension benefits could find his "exclusive remedy" only under §502(a) of ERISA for violations of §510. 498 U.S. at 145. Regarding the scope of the employee's remedy, the Court held that

> there is no basis in §502(a)'s language for limiting ERISA actions to only those which seek "pension benefits". ***It is clear that the relief requested here is well within the power of federal courts to provide***.

*Id.* (emphasis added). The employee in that case did not seek lost pension benefits "but [was] instead seeking **future lost wages, mental anguish and punitive damages** as a result of the wrongful discharge". *Id.* at 136 (emphasis added). Although the Court did not directly address there the issue of available relief, its unanimous *dictum* persuaded many that a wrongfully discharged employee might recover lost wages in addition to plan benefits lost. Indeed, the availability of the six enforcement provisions of §502(a) was central to the Court's finding of preemption. *Id.* at 143-44.

Part of this question is, did Congress mean to include front pay or reinstatement and back pay within §502(a)(3)(B), which allows a participant or beneficiary to bring a civil action "to obtain other appropriate equitable relief?" The Circuits split on this issue. *Compare Schwartz v. Gregori*, 45 F.3d 1017 (6th Cir.), *cert. denied*, 116 S.Ct. 77, 133 L.Ed.2d 36 (1995) (allowing recovery of front and back pay) with *Harsch v. Eisenberg*, 956 F.2d 651 (7th Cir.), *cert. denied*, 506 U.S. 818, 113 S.Ct. 61, 121 L.Ed.2d 29 (1993). In the context of a claim for breach of fiduciary duty against a nonfiduciary, this Court held in *Mertens v. Hewitt Associates*, 508 U.S. 248, 255,

113 S.Ct. 2063, 124 L.Ed.2d 161 (1993), that losses resulting in underfunding of a pension plan were compensatory damages, the "classic form" of legal relief, and not recoverable under §502(a)(3). *Mertens* did not address the issue at bar. Rather, the Court there interpreted §502(a)(3) within the limited context of a breach of fiduciary duty claim. Here, of course, Petitioner has brought a claim for wrongful discharge under a different statute of ERISA which Congress has deemed to be their mandatory substitute for the entire panoply of their California tort-law remedies. The four dissenting Justices in *Mertens* noted that "we have elsewhere recognized the anomaly of construing ERISA in a way that 'would afford *less* protection to employees and their beneficiaries than they enjoyed before ERISA was enacted'". 508 U.S. at 264 (White, J., dissenting). The *Mertens* dissent went on to state that "[t]he traditional 'equitable remedies' available to a trust beneficiary included compensatory damages.... This included, where necessary, the payment of a monetary award to make the victims of the breach whole." *Id.* at 266 (citations omitted).

Because §510 fundamentally prohibits discrimination in employment status and preempts all state torts for wrongful discharge related to pensions and benefits, it is only reasonable that Congress intended to provide not only corresponding Federal rights, but also analogous Federal remedies. At a minimum lost employment damages such as back pay and front pay (in lieu of reinstatement) are appropriate remedies along with recovery of lost plan benefits. This Court recognized in *Varity* that Congress intended ERISA to provide "broad remedies" to redress violations of the statute. Thus, *Varity* found §502(a)(3) to be a "catchall" relief provision that "act[s] as a safety net" for injured plan participants. 116 S.Ct. at 1078. A court cannot make whole an employee wrongfully discharged in violation of §510 by awarding only lost plan benefits. Broad restitution for lost wages and similar losses must stand as a



fundamental part of the remedy for wrongful discharge or the Federal right conferred under §510 will become a very meager substitute for the preempted state tort claims.

This conclusion also is informed by Congress' general practice in every other Federal statute prohibiting employment discrimination to provide back pay and reinstatement (or front pay) as remedies. *See, for example, Albemarle Paper Co. v. Moody*, 422 U.S. 405, 419 and n.11, 95 S.Ct. 2362, 45 L.Ed.2d 280 (1975) (interpreting §10 of the NLRA, 29 U.S.C. §160 and Title VII, 42 U.S.C. §2000e-5(g)), the Court stated that "[w]e can find here no intent to back away from the NLRA model or to denigrate in any way the status of back pay relief"), and *Rodriguez v. Taylor*, 569 F.2d 1231, 1242 (3d. Cir.), *cert. denied*, 436 U.S. 913, 98 S.Ct. 2254, 56 L.Ed.2d 414 (1978) (interpreting the ADEA, 29 U.S.C. §626(c)(1)).

The Sixth Circuit in *Schwartz* relied on this Court's interpretation of *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 80 S.Ct. 332, 4 L.Ed.2d 323 (1960), as discussed in *Local 391 v. Terry*, 494 U.S. 558, 571, 110 S.Ct. 1339, 108 L.Ed.2d 519 (1990), for the rule that back pay awarded against an employer "to restore to the plaintiff that to which she would have enjoyed but for the employer's illegal retaliation" is restitutionary. 45 F.3d at 1022. The Sixth Circuit found the "question of front pay ... more straightforward" since "[f]ront pay is awarded only when the preferred remedy of reinstatement, indisputably an equitable remedy, is not appropriate or feasible." *Id.* at 1023, citing cases under Title VII and ADEA. Respondents here can be expected to argue that reinstatement of the members of Petitioner Association to their former positions is inappropriate. Therefore the Court needs to make clear to the district court that "appropriate equitable relief" will require making whole the victims of Respondents' ERISA-defeating conduct.

## - VI.

## THE DECISION BELOW AT ITS CRUX DENIES ACCESS TO JUSTICE

The decision below is fundamentally about access to justice and its denial. In ruling out of existence a suit under ERISA §510 for interference with health and welfare benefits, the Ninth Circuit has done violence not only to the intent of Congress and to the Court's precedents, but also to the Constitution and our founding notion of the rule of law. *See, for example, Romer v. Evans*, 116 S.Ct. 1620, 1628, 134 L.Ed.2d 855 (1996). A central principle of our constitutional tradition is the principle that the courts remain open on impartial terms to those who seek its assistance.

Yet the *per curiam* opinion by the panel below disqualified from proceeding under §510 the entire class of persons whose health and welfare benefits motivated their discharges while it conferred the right to proceed upon those fired because of their pension benefits. This classification cannot withstand any level of scrutiny. The panel totally lost sight of the point that Petitioner Association's members' remedies under state law, *see, for example, Tameny v. Atlantic Richfield Co.*, 27 Cal.3d 167, 175, 610 P.2d 1330, 164 Cal.Rptr. 839 (1980), were involuntarily exchanged for a federal remedy by Congress when it enacted ERISA. *Varity*, 116 S.Ct. at 1078-1079; *Ingersoll-Rand*, 498 U.S. at 133.

This right to a remedy for every wrong runs through the Court's jurisprudence as a brilliant, redeeming strand from the earliest days of our republic, *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163, 2 L.Ed. 60 (1803), up till the present term,



*M.L.B. v. S.L.J.*, No. 95-853, 65 U.S.L.W. 4035, 4040 and 4043 (U.S., Dec. 16, 1996) (Kennedy, J., concurring).

The panel below dealt with this constitutional concern in as cavalier a fashion as it did with the related issue of associational standing, *Brown Group*, 116 S.Ct. at 1536, and the other issues present here.

## CONCLUSION

Justice requires that this Court reverse the Ninth Circuit's crabbed interpretation of §510 of ERISA and find that the statute prohibits interference with health and welfare benefits by wrongful discharge from employment. The decision below contravenes the language of the statute and Congress' broad remedial intent behind ERISA. Not only does it conflict with all the other circuit courts which have addressed this issue, its holding and rationale leave Petitioner and its members without access to justice to enforce either their preempted state-law rights or their ERISA-bestowed Federal rights which Congress intended to substitute for the lost state tort remedies.

Petitioner also urges the Court to expand on its decision in *Ingersoll Rand v. McClendon* to clarify that employees wrongfully discharged in violation of §510 have a right to full restitution, including front pay (or reinstatement) and back pay. The case should be reversed and remanded with the mandate to fashion broadly remedial relief to make whole the Respondents' victims.

Respectfully submitted,

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No. 96-491

# In the Supreme Court of the United States

OCTOBER TERM, 1996

INTER-MODAL RAIL EMPLOYEES ASSOCIATION, ET AL.,
PETITIONERS

*v.*

ATCHISON, TOPEKA AND SANTA FE RAILWAY
COMPANY, ET AL.

*ON WRIT OF CERTIORARI*
*TO THE UNITED STATES COURT OF APPEALS*
*FOR THE NINTH CIRCUIT*

## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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## QUESTION PRESENTED

Section 510 of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1140, makes it unlawful for any person to take specified adverse action against an employee benefit plan participant "for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan." The question presented is:

Whether Section 510 applies to an employer's decision to discharge employees and to contract out their jobs to another company for the purpose of interfering with the employees' attainment of rights to welfare benefits.

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# In the Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-491

INTER-MODAL RAIL EMPLOYEES ASSOCIATION, ET AL., PETITIONERS

*v.*

ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL.

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

**BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS**

## INTEREST OF THE UNITED STATES

This case raises an important issue concerning the interpretation of Section 510 of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1140. The Secretary of Labor is authorized to bring actions to redress violations of Section 510, see 29 U.S.C. 1132(a)(5), and to intervene in such actions brought by private parties, see 29 U.S.C. 1132(h).

## STATUTORY PROVISION INVOLVED

Section 510 of ERISA, 29 U.S.C. 1140, provides:

> It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan, this subchapter, section 1201 of this title, or the Welfare and Pension Plans Disclosure Act [29 U.S.C. 301 et seq.], or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan, this subchapter, or the Welfare and Pension Plans Disclosure Act. It shall be unlawful for any person to discharge, fine, suspend, expel, or discriminate against any person because he has given information or has testified or is about to testify in any inquiry or proceeding relating to this chapter or the Welfare and Pension Plans Disclosure Act. The provisions of section 1132 of this title shall be applicable in the enforcement of this section.

## STATEMENT

1. The Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001 *et seq.*, "is a comprehensive statute designed to promote the interests of employees and their beneficiaries in employee benefit plans." *Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85, 90 (1983). Section 510 of ERISA, 29 U.S.C. 1140, is a central component of the Act's protections of employee benefits. Section 510 protects employee benefit plan participants from retaliation for exercising rights to which they are entitled under their employee benefit plans, and it prohibits "discharge" of a



participant "for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan." 29 U.S.C. 1140. "Congress viewed [Section 510] as a crucial part of ERISA because, without it, employers would be able to circumvent the provision of promised benefits." *Ingersoll-Rand Co.* v. *McClendon*, 498 U.S. 133, 143 (1990); see also *Hazen Paper Co.* v. *Biggins*, 507 U.S. 604, 612 (1993).[1]

ERISA defines the term "employee benefit plan" or "plan" as "an employee welfare benefit plan or an employee pension benefit plan," or a plan which is both. 29 U.S.C. 1002(3). A welfare plan is a plan that, "through the purchase of insurance or otherwise," provides "(A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 186(c) of this title (other than pensions on retirement or death, and insurance to provide such pensions)." 29 U.S.C. 1002(1). A pension plan is "any plan, fund, or program [that] * * * (i) provides retirement income to employees, or (ii) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond." 29 U.S.C. 1002(2)(A).[2] Disability coverage can be provided

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[1] Participants and beneficiaries are authorized to file civil actions to obtain relief for violations of Section 510 under Section 502(a)(3) of ERISA, 29 U.S.C. 1132(a)(3), and the Secretary is authorized to bring such actions under Section 502(a)(5), 29 U.S.C. 1132(a)(5).

[2] ERISA divides pensions into one of two types: defined contribution plans and defined benefit plans. In a defined con-

through either a welfare or a pension plan. See 29 U.S.C. 1002(1); 29 C.F.R. 4022.21(a)(2)(ii), 4022.6(a). Severance pay benefits and cost-of-living retirement supplements also can, under specified circumstances, be treated either as welfare or pension plans. See 29 U.S.C. 1002(2)(B).[3]

ERISA regulates the accrual and vesting of pension benefits. Accrual refers to the manner in which an employee earns increased benefits over time. See 29 U.S.C. 1002(23) and (29). Every pension plan must define its accrual method consistent with ERISA's specifications. 29 U.S.C. 1054. Vesting refers to the method by which benefits become nonforfeitable. See 29 U.S.C. 1002(19) and (25); see *Hazen Paper*, 507 U.S. at 611. ERISA requires that a pension plan provide for vesting at least by the time an employee has completed five years of service, 29 U.S.C. 1053(a)(2)(A),[4] or, if the plan provides for "incremental" vesting, pension benefits must, at a minimum, vest at a rate of 20% per year beginning when the employee has completed three years of service, 29 U.S.C. 1053(a)(2)(B). Vesting gives an employee a nonforfeitable right to benefits accrued, and, once the employee is fully vested, additional accruals are gained on a nonforfeitable basis.

tribution plan, the employer makes contributions into accounts established on behalf of individual employees, and the value of the pension benefit is the sum of the contributions plus any investment returns. 29 U.S.C. 1002(34). Defined benefit plans are all other pension plans. 29 U.S.C. 1002(35). Defined benefit plans generally pay a dollar amount at retirement based upon a formula, which usually takes into account the employee's age, years of service, and average salary during the final years of service.

[3] With respect to pension plans, but not welfare plans, see 29 U.S.C. 1051(1), 1081(a)(1), Congress established minimum funding, participation and vesting requirements, as well as an insurance program to pay benefits promised by employers who become insolvent. 29 U.S.C. 1051-1061, 1081-1086, 1301-1461.

[4] Multi-employer plans, in contrast, are required to provide for vesting by the time an employee has completed ten years of service. 29 U.S.C. 1053(a)(2)(C).



In contrast to pension benefits, welfare benefits typically are funded on a "pay-as-you-go" basis. ERISA does not require vesting of welfare benefits and does not regulate their accrual. For example, whether an employer self-insures for the costs of employee medical care or purchases insurance, the employer ordinarily pays for treatments or pays premiums for current employees during the period of their employment. Welfare benefits may also, however, have contractually imposed minimum years-of-service eligibility criteria analogous to the criteria for accrual or vesting of pension benefits. For example, employees may be eligible under the terms of the plan for severance pay, health benefits during their retirement, disability benefits, or supplemental retirement income benefits only if they have worked for the employer a minimum number of years.

2. Petitioners are five former employees of respondent Santa Fe Terminal Services (SFTS), a wholly owned subsidiary of respondent Atchison, Topeka and Santa Fe Railroad (Atchison). Pet. App. 5a, 7a, 22a-23a (¶¶ 8-9), 24a (¶ 13).[5] SFTS performed "inter-

[5] A sixth plaintiff, Inter-Modal Rail Employees Association (IMREA), is a non-profit mutual benefit corporation formed by former employees of SFTS to conduct this litigation. Pet. App. 22a (¶ 6). The court of appeals held that IMREA lacks standing. *Id.* at 6a. Although petitioners sought review of that holding (see Pet. i (Question 2)), this Court's grant of certiorari did not include that issue.

modal" (loading and unloading) work exclusively for Atchison at its Hobart rail yard. *Id.* at 25a (¶ 15). SFTS employed approximately 200 persons at the Hobart Yard. *Id.* at 23a (Compl. ¶ 12).[6]

While employed by SFTS, petitioners were covered by a Teamsters' Union employee benefit program adopted pursuant to a collective bargaining agreement with the Teamsters' Union. Pet. App. 26a (¶ 19). The employee benefits included a health and welfare plan, a pension plan, and a supplemental benefit plan. *Ibid.* SFTS made substantial contributions on petitioners' behalf to those benefit funds. *Ibid.* In addition, petitioners were covered by the Railroad Retirement Act of 1974, 45 U.S.C. 231 *et seq.*, and SFTS made required contributions on their behalf to the Railroad Retirement Board. Pet. App. 7a, 26a (¶ 19).

From 1974 to 1990, SFTS performed Atchison's intermodal work at the Hobart Yard subject to Atchison's day-to-day management and control. Pet. App. 23a (¶ 9), 25a (¶¶ 15-16). On January 1, 1990, Atchison and SFTS for the first time entered into a written contract for the intermodal work. *Id.* at 26a (¶ 21). The contract provided that Atchison could terminate it in the event that SFTS's services became unsatisfactory. *Ibid.* During January 1990, SFTS management met with petitioners to assure them of their job security and to outline SFTS's plans to become "the leading 'piggy-back' and container hauler in the country." *Id.* at 26a (¶ 20). In February 1990, however, Atchison terminated its contract with SFTS and solicited bids for the work. *Id.* at 27a (¶¶ 22-23). On March 16, 1990, Atchison awarded the contract to respondent In-Terminal Services, Division of Mi-Jack Products, Inc. (ITS). *Id.* at 27a (¶ 26). Three days later, ITS informed petitioners that it had been awarded the contract to operate the Hobart Yard facility, and ITS and Atchison invited petitioners to apply for positions with ITS. *Ibid.* SFTS then sold its Hobart Yard assets to ITS for a nominal sum on concessional credit terms and discharged its employees, including petitioners. *Id.* at 27a (¶¶ 25, 27). ITS thereafter hired petitioner Franks and many other former SFTS employees to perform the same work they had previously performed for SFTS. *Id.* at 28a (¶ 29).

ITS, which the Railroad Retirement Board found was not an "employer" covered by the Railroad Retirement Act of 1974, does not make contributions to the Railroad Retirement Board. Pet. App. 28a, 29a (¶¶ 30, 32). Managers of respondents Atchison and SFTS told petitioners that the reason they had contracted out the intermodal work was to avoid making contributions to the Railroad Retirement Board. *Id.* at 28a (¶¶ 28, 31). In addition, petitioners receive lower contributions to and benefits from their pension plan and their health and welfare plan as the result of their discharge from SFTS and reemployment by ITS. *Id.* at 28a, 29a, 30a (¶¶ 30, 33, 38).

3. Petitioners brought this action in the United States District Court for the Central District of California, alleging that respondents violated Section 510 of ERISA by conspiring to discharge them "for the express purpose of depriving [petitioners] of most,

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[6] This case was decided on respondents' motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), and the allegations of petitioners' complaint therefore must be taken as true. The facts in this Statement are based on the allegations in the complaint.

if not all of the substantial, ERISA-protected 'fringe' benefits of their employment with SFTS." Pet. App. 30a (¶ 37); see also *id.* at 7a, 29a (¶ 33). The district court, without written opinion, granted respondents' motion to dismiss the Section 510 allegations for failure to state a claim. *Id.* at 16a-17a.[7]

4. The court of appeals affirmed in part and reversed in part. Pet. App. 1a-15a. The court reversed the district court's dismissal of the Section 510 claim insofar as it was based on alleged interference with petitioners' attainment of rights to pension benefits. The court held that because ERISA "'protects plan participants from termination motivated by an employer's desire to prevent a pension from vesting,'" petitioners "clearly stated a claim under section 510." Pet. App. 8a (quoting *Ingersoll-Rand*, 498 U.S. at 143).[8] Respondents did not seek review of that holding with respect to interference with pension benefits.[9]

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[7] Petitioners also brought class action claims under the Federal Employers' Liability Act (FELA), 45 U.S.C. 51 *et seq.*, alleging that Atchison and SFTS unlawfully exposed class members to harmful levels of noise and toxic chemicals. Pet. App. 30a-35a (¶¶ 41-56). The district court dismissed those claims as well. *Id.* at 17a. The court of appeals remanded for consideration of the class claims. *Id.* at 12a-13a. Respondents did not seek review of the court of appeals' disposition of the FELA claims.

[8] The court rejected respondents' contention that "incidental or consequential loss of future, unaccrued pension benefits is not actionable," concluding that "questions of motivation and intent are not to be resolved at the pleading stage." Pet. App. 8a.

[9] The court affirmed the dismissal of petitioners' Section 510 claim of interference with attainment of retirement benefits governed by the Railroad Retirement Act of 1974, reasoning that plans covered by that Act are "governmental plan[s]" excluded from ERISA coverage. Pet. App. 9a-12a. Although petitioners sought review of that holding (Pet. i (Question 1)), the Court's grant of certiorari did not include that question.



By contrast, the court of appeals affirmed the dismissal of petitioners' Section 510 claim insofar as it was based on interference with petitioners' welfare benefits. Pet. App. 8a-9a. The court observed that, "[u]nlike pension benefits, welfare benefits do not vest," and that an employer accordingly may unilaterally amend or eliminate welfare benefits without considering its employees' interests. *Id.* at 8a. Because, in its view, "existence of a present 'right' is prerequisite to section 510 relief, and employees have no present 'right' to future, anticipated welfare benefits," the court of appeals concluded that no claim lies under Section 510 for interference with attainment of rights to welfare benefits. *Id.* at 9a. The court acknowledged that other courts of appeals have reached a contrary conclusion and have held that "[t]he validity of a § 510 claim does not hinge upon whether the benefits involved are vested but upon the purpose of the discharge," *id.* at 8a n.6 (quoting *Seaman* v. *Arvida Realty Sales*, 985 F.2d 543, 546 (11th Cir.), cert. denied, 510 U.S. 916 (1993)), and that "[t]he emphasis of a Section 510 action is to prevent persons and entities from taking actions which might cut off or interfere with a participant's ability to collect present or future benefits," *ibid.* (quoting *Tolle* v. *Carroll Touch, Inc.*, 977 F.2d 1129, 1134 (7th Cir. 1992)).

## SUMMARY OF ARGUMENT

1. Petitioners have stated a claim under Section 510 of ERISA of "interfer[ence] with the attainment of a[] right" to which they might have "become entitled" under their employee welfare benefit plan. In rejecting that claim, the court of appeals erroneously reasoned that Section 510 covers only rights to pension or vested benefits, and that, because welfare benefits do not vest, employees lack any "right" to the "future, anticipated" attainment of such benefits within the meaning of Section 510. The text of Section 510 cannot be squared with that construction. It expressly applies to "employee benefit plan[s]," which ERISA defines to include both pension plans and welfare plans. Section 510 also is not limited to vested rights, or to rights capable of vesting, but refers to "any right." Finally, Section 510 cannot be limited to pension benefits on the ground that only such rights are subject to statutory vesting and accrual under ERISA, because Section 510 protects contractual rights conferred under a "plan" as well as statutory rights guaranteed by ERISA.

2. There likewise is no merit to the court of appeals' suggestion that welfare benefits are not covered by Section 510 because employers retain rights to amend or terminate welfare benefit plans that they lack with respect to pension plans. The established power to amend or terminate a plan, which can result in a prospective loss of welfare benefits, does not abrogate Section 510's express prohibition against discharging employees (or taking other adverse action against them) to achieve the same end *without* amending or terminating the plan. Section 510 reflects Congress's judgment that an employee's job should not be placed at risk based on an employer's acceptance of what turn out to be overly burdensome welfare benefit obligations. The proper way for employers to reduce benefits-related costs is to amend or terminate the plan, according to the procedures prescribed in ERISA and the plan itself.



3. Section 510 requires allegations of a specific intent to interfere with benefit rights to which a participant may become entitled. Petitioners adequately alleged that their discharges were in fact motivated by respondents' desire to deprive them of welfare benefits, in violation of Section 510. The court of appeals found those allegations of intent sufficient to support petitioners' pension benefits-related claim, and respondents have not cross-petitioned to challenge that holding. There is no reason why the same allegations should not suffice to support the parallel claim based on interference with rights to welfare benefits.

## ARGUMENT

### SECTION 510 OF ERISA PROHIBITS THE DISCHARGE OF EMPLOYEES FOR THE PURPOSE OF INTERFERING WITH THEIR ATTAINMENT OF RIGHTS UNDER AN ERISA-COVERED EMPLOYEE WELFARE BENEFIT PLAN

The court of appeals erred in holding that Section 510 of ERISA is categorically inapplicable to claims of interference with the attainment of rights under an employee welfare benefit plan. The court held that petitioners "clearly stated a claim under section 510" insofar as their pension benefits are concerned, but distinguished their otherwise identical claim of interference with attainment of welfare benefits on the ground that, unlike pension benefits, welfare benefits

do not vest and therefore cannot constitute present "rights" to benefits protected by Section 510. Pet. App. 8a-9a. The court's decision limiting Section 510 protection to pension benefits, or to vested rights, is insupportable and should be reversed.

1. The text of Section 510 makes no distinction between pension and welfare benefits. It refers generically to rights under "employee benefit plan[s]," and prohibits interference with the attainment of rights to which a person may become entitled under such a "plan." 29 U.S.C. 1140. ERISA defines the term "employee benefit plan" or "plan" as "an employee welfare benefit plan or an employee pension benefit plan" (or a plan which is both). 29 U.S.C. 1002(3). Thus, under Section 510, "'[p]lan' includes both pension and welfare plans." *Heath* v. *Varity Corp.*, 71 F.3d 256, 258 (7th Cir. 1995); see, *e.g.*, *Kross* v. *Western Elec. Co.*, 701 F.2d 1238, 1243 (7th Cir. 1983) (applying Section 510 to claim of discharge for the purpose of interfering with rights under medical, dental and life insurance plans).

In distinguishing welfare benefits from pension benefits, the court below relied on the fact that, "[u]nlike pension benefits, welfare benefits do not vest." Pet. App. 8a. According to the court, "existence of a present 'right' is prerequisite to section 510 relief, and employees have no present 'right' to future, anticipated welfare benefits." *Id.* at 9a. The court's limitation of Section 510 to statutorily vested rights cannot, however, be squared with the statutory text. Section 510 expressly prohibits interference with the attainment of "*any* right to which [a] participant may become entitled." 29 U.S.C. 1140 (emphasis added), not merely vested rights. If Congress had intended to limit Section 510's coverage in the



manner the court of appeals believed, "it easily could have referred to 'vested rights.'" *Conkwright* v. *Westinghouse Elec. Corp.*, 933 F.2d 231, 237 (4th Cir. 1991).[10] Section 510 is therefore correctly read to provide that "an employer may not discharge employees to prevent them from taking advantage of benefits even if those benefits are not yet vested." *Seaman* v. *Arvida Realty Sales*, 985 F.2d 543 (11th Cir.), cert. denied, 510 U.S. 916 (1993).

Consistent with Section 510's reference to "any right," the courts of appeals have rejected an interpretation of Section 510 that would deny its protection to rights that will vest in the future. They have thus uniformly held that Section 510 protects employees whose pension benefits have already vested from discharges designed to prevent them from becoming eligible to obtain additional benefits in the future. See, *e.g.*, *Heath*, 71 F.3d at 257-259 (discharge did not affect vested pension, but Section 510 triggered because discharge rendered employee ineligible

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[10] A principal sponsor of the legislation, introducing the Conference Report on the Senate floor, explained that Section 510 provides protection for employees by prohibiting "discharge, or other discriminatory conduct toward participants and beneficiaries which is designed to interfere with attainment of *vested benefits or other rights* under the bill." 120 Cong. Rec. 29,933 (1974) (Sen. Williams) (emphasis added). The court of appeals' interpretation cannot be squared with that explanation of Section 510.

There is, by contrast, nothing in the legislative history that suggests that Section 510 prohibits only interference with the attainment of pension benefits, or benefits subject to vesting. See generally Staff of Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, 94th Cong., 2d Sess., *Legislative History of the Employee Retirement Income Security Act of 1974* (Comm. Print 1976).

for early retirement package); *Seaman*, 985 F.2d at 545 (discharge did not affect contributions already made under 401(k) plan, but Section 510 prohibited discharge for purpose of interfering with health insurance coverage and future participation in 401(k) plan); *Conkwright*, 933 F.2d at 236-238 (Section 510 gives fully vested employees a cause of action against employers who take adverse action in order to prevent accrual of additional pension benefits); *Dister* v. *Continental Group, Inc.*, 859 F.2d 1108, 1110-1111, 1115 (2d Cir. 1988) (employee with vested basic pension rights had prima facie case under Section 510 of interference with ability to earn additional pension benefits); see also *Kross*, 701 F.2d at 1242-1243 (rejecting argument that, because employee was already a participant in medical and dental insurance plans, his discharge could not interfere with his attainment of rights under those plans). There is no relevant distinction under Section 510 between non-vested employees' rights to welfare benefits and vested pension beneficiaries' rights to accrue additional benefits; in either case, the employer could prevent the accrual of additional benefits by amending the plan on a prospective basis. See pages 18-21, *infra*.

Section 510's explicit protection of rights to which a participant "may become entitled" further confirms that interference with the attainment of future, anticipated benefits is not, as the court of appeals held, excluded from its scope. The quoted phrase demonstrates that Section 510 protects not only rights to which a participant is *already* entitled, but also "permits suits for interfering with rights not yet earned." *Conkwright*, 933 F.2d at 237. Indeed, discharging *non*-vested employees in the *anticipation* that they are about to attain vested rights is a quin-



tessential Section 510 violation. *Ingersoll-Rand Co.* v. *McClendon*, 498 U.S. 133, 143 (1990).[11] By the same token, the terms of Section 510 plainly bar the discharge of an employee for the purpose of preventing him from making future claims for welfare benefits to which the employee would become entitled had he remained employed. See, *e.g.*, *Shahid* v. *Ford Motor Co.*, 76 F.3d 1404, 1411 (6th Cir. 1996) (right to participate in voluntary termination plan in the future is a right to which an employee "may become entitled," and is thus covered by Section 510 even though it is not a right that vests); *Kross*, 701 F.2d at 1241-1243 (rights to continued participation in life and medical insurance plans are covered by Section 510).

Reading Section 510 to prohibit interference with a participant's future entitlement to welfare benefits is essential to serving the congressional purpose underlying the provision. If the attainment of future benefits under an existing welfare plan were not protected from interference, an employer would be free to discharge employees because it believed they were likely to claim benefits under the plan. For example, under the court of appeals' reasoning, an employer could, consistent with Section 510, dis-

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[11] The comments of legislators supporting the legislation cited discharge of employees about to vest in their pensions as an example of conduct Congress intended to proscribe by enacting Section 510. See, *e.g.*, 119 Cong. Rec. 30,044 (1973) (Sen. Javits); 120 Cong. Rec. 29,935 (1974) (same). As Senator Hartke stated, "[t]he key to effective pension reform is early vesting, but a vesting provision is no better than the protection employees have against improper discharge—including layoff—discipline or other discrimination that puts an employee out of a job before vesting is achieved, thereby defeating his pension claim." 119 Cong. Rec. 29,563 (1973).

charge an employee who it knew needed surgery, for the purpose of preventing the employee from making a claim for surgical coverage under a health benefits plan—or could discharge a terminally ill employee in order to prevent him from attaining a death benefit. The reasoning of the court below would also permit an employer to discharge the group of employees who had filed the most claims under the employer's health plan during the previous year, based on projections that those employees would file the most claims in the future.[12] In each of those circumstances, the discharge would allow the employer to circumvent promises that it had made in its benefit plan. Section 510's reference to benefits to which an employee "*may become* entitled" makes clear that the discharge of employees for those purposes is precisely the evil that Section 510's interference clause was designed to prevent.

Section 510 also cannot, consistent with its terms and this Court's precedents, be limited to protecting rights that, although not yet vested, are subject to accrual or vesting under ERISA itself. The section expressly protects not only rights that a participant may attain under "this subchapter" of ERISA—such as statutory rights to pension vesting, or statutory anti-cutback rights against the reduction of accrued benefits, see 29 U.S.C. 1054(g); *Ahng* v. *Allsteel, Inc.*, 96 F.3d 1033, 1036-1037 (7th Cir. 1996)—but more

[12] Similarly, under the court's reasoning, an employer that had contractually bound itself to pay health benefits to retired employees for life, see, *e.g.*, *Bidlack* v. *Wheelabrator Corp.*, 993 F.2d 603, 604-605 (7th Cir.) (en banc), cert. denied, 510 U.S. 909 (1993), could, consistently with Section 510, render such benefits illusory by firing employees before they reached retirement age.



broadly protects all rights that a participant may attain under a "plan." Thus, Section 510, like ERISA generally, protects contractually defined rights to benefits, as well as statutory rights such as the vesting and accrual rights guaranteed by the Act. Cf. *Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. 101, 113 (1989) ("ERISA was enacted 'to promote the interests of employees and their beneficiaries in employee benefit plans' and 'to protect contractually defined benefits'") (citation omitted). Section 510 applies to "promised benefits," *Ingersoll-Rand*, 498 U.S. at 143, as well as those that are statutorily required. For example, in the pension context, although ERISA generally requires that the right to a pension benefit must vest after five years, 29 U.S.C. 1053(a)(2)(A), an employer may adopt a more generous plan providing for full vesting after three years. An employer's discharge of an employee shortly before she has attained three years of service—for the purpose of preventing her attainment of her contractual right to vest—runs afoul of Section 510 just as clearly as does a discharge for the purpose of preventing vesting under a plan adopting the statutory-minimum five-year schedule. In the welfare benefits context, a discharge motivated by the desire to prevent an employee from taking advantage of non-pension disability, severance, or health benefits similarly violates Section 510.

2. Contrary to the court of appeals' suggestion (see Pet. App. 8a-9a), the right to amend or terminate a welfare benefits plan does not remove such plans from Section 510 coverage. To be sure, ERISA does not preclude a plan sponsor, as settlor of a plan trust, from terminating or amending a welfare plan (unless the employer has promised not to do so). 29 U.S.C. 1343(c); *Curtiss-Wright Corp.* v. *Schoonejongen*, 115

S. Ct. 1223, 1228 (1995); *Owens* v. *Storehouse, Inc.*, 984 F.2d 394, 396-398 (11th Cir. 1993); *McGann* v. *H & H Music Co.*, 946 F.2d 401, 405-408 (5th Cir. 1991), cert. denied, 506 U.S. 981 (1992); see also 29 U.S.C. 1051(1) (exempting welfare plans from ERISA's vesting and participation requirements). But as Judge Easterbrook has observed, "[t]he greater power to abolish the plan" does not include "the lesser power to deny benefits to particular persons." *Heath*, 71 F.3d at 257.[13] The mere fact "[t]hat [the employer], by

[13] *Heath* reversed a district court decision that relied, as did the court of appeals here, on the power to amend or terminate welfare benefit plans as a basis for excluding rights under such plans from Section 510 coverage. The Seventh Circuit persuasively rejected that rationale:

> The district court thought that the statute as a whole contains a contradiction: why must an employer that is free to modify or abolish a plan ensure that each employee receives its full benefits? To resolve this supposed contradiction the district court limited § 510 to the sort of benefits that an employer cannot affect by changing or abrogating the plan. Yet a court should endeavor to apply all parts of a statute whenever possible. * * * Legislation reflects compromise among competing interests. That employers won a battle and secured the right to modify plans, while employees prevailed in a different skirmish and secured the right to qualify for benefits under existing plans, shows no more than that each side could claim some victories. It upsets the legislative balance to push the outcome farther in either direction. Just as a court should not use § 510 and ERISA's other fiduciary obligations to curtail the employer's right to modify a plan, so a court should not use the employer's power to amend as a reason to curtail § 510.

71 F.3d at 258 (citation omitted). See also *Shahid*, 76 F.3d at 1412 ("According to the balance struck by Congress, employees' reliance on ERISA plans is protected until an employer



changing the terms of its plan, lawfully could have deprived its [employees] of these benefits does not allow it to offer benefits but prevent its [employees] from taking advantage of those benefits on pain of discharge." *Seaman*, 985 F.2d at 547. For example, it might not violate Section 510 to amend a plan prospectively to eliminate coverage of certain health conditions, see *H & H Music Co.*, *supra*,[14] but it would violate Section 510 to discharge employees known to have those health conditions while continuing to maintain a plan purporting to provide such coverage.

There are sound reasons why ERISA generally permits plan sponsors to amend welfare plans prospectively to modify the types or levels of benefits provided, but at the same time prohibits taking adverse employment actions against participants to prevent them from attaining rights under such plans. By declining to subject employee welfare plans to statutory vesting requirements, Congress provided employers with flexibility that would permit them to offer generous benefits, without fearing that they would be "stuck with terms that in retrospect proved to be excessively costly." See *Heath*, 71 F.3d at 258; see also H.R. Rep. No. 807, 93d Cong., 2d Sess. 60 (1974) (vesting requirements for welfare plans would

complies with the applicable amendment or termination procedure.") (footnote omitted).

[14] Such action might, however, violate other state or federal laws, such as the Americans with Disabilities Act of 1990, 42 U.S.C. 12112(a) (prohibiting discrimination against persons with disabilities with respect to compensation and "other terms, conditions, and privileges of employment"). See U.S. Amicus Br. in *Greenberg* v. *H & H Music Co.* at 8, 17-18 (No. 91-1283).

seriously complicate administration and increase cost of such plans).

On the other hand, Section 510 is one of the standards of conduct that Congress imposed in order to ensure that the furnishing of employee benefits, once undertaken, is fair and ordered. ERISA's incorporation of fiduciary standards ensures that plan administrators and others manage plan assets prudently and in the sole interest of participants, and that participants' claims for benefits are evaluated impartially and in accordance with plan provisions. *Heath*, 71 F.3d at 258; see ERISA §§ 403(c) and 404, 29 U.S.C. 1103(c) and 1104; *Varity Corp.* v. *Howe*, 116 S. Ct. 1065, 1074-1075, 1078-1079 (1996). Section 510 complements those provisions by ensuring that persons with power over participants' employment do not take employment actions against them that prevent the terms of the plan from being realized. Thus, Section 510 "makes employers' promises of benefits credible" and, along with other ERISA provisions, protects "employees' reliance on ERISA plans * * * until an employer complies with the applicable amendment or termination procedure." *Shahid*, 76 F.3d at 1412; see also *Heath*, 71 F.3d at 258.

This Court recently recognized that "proposed plan amendments" are "fairly serious events" that must be "given the special consideration they deserve." See *Curtiss-Wright*, 115 S. Ct. at 1230; see also *Heath*, 71 F.3d at 259 (referring to need to "use[] the amendment procedure laid out in the plan or proper under general corporate law"). Amendment or abolition of plans must follow any plan and statutory procedures regulating such changes. The allegations of the complaint in this case support an inference that Atchison sought to contract out its Hobart Yard work to ITS in



order to avoid its obligations to the Hobart Yard employees under the collectively bargained Teamsters' employee benefit program without negotiating an amendment to that program. Section 510 should be read to reinforce rather than undermine the prerequisites for plan amendments and terminations.

3. Respondents asserted below that any interference with petitioners' ERISA-covered benefits was a mere consequence of, as opposed to a motivating factor behind, petitioners' discharge. Atchison & SFTS C.A. Br. 10; ITS C.A. Br. 9; Resp. Br. in Opp. 6 ("[N]o court has ever held that a Section 510 claim can be established based on a mere reduction in employee benefits resulting from a lawful change in contractors."). That assertion, however, does not support affirmance of the dismissal of petitioners' claim of interference with their attainment of rights under the welfare plan.

We agree with respondents that a specific intent to interfere with a participant's rights is a necessary element of a Section 510 claim, and the courts of appeals have uniformly so held. See, *e.g.*, *Shahid*, 76 F.3d at 1411; *Conkwright*, 933 F.2d at 238; *Unida* v. *Levi Strauss & Co.*, 986 F.2d 970, 979-980 (5th Cir. 1993); *Dytrt* v. *Mountain State Tel. & Tel. Co.*, 921 F.2d 889, 895-896 (9th Cir. 1990); *Dister*, 859 F.2d at 1111; *Gavalik* v. *Continental Can Co.*, 812 F.2d 834, 851 (3d Cir.), cert. denied, 484 U.S. 979 (1987). Where a decision to discharge a large group of employees—such as in connection with a plant closing or a decision to contract out work—is motivated by a desire to save money, the employer may usually be indifferent to whether its savings will result from lower benefits costs or from other factors. In such a case, the employer likely would lack the requisite intent to

support a Section 510 claim. See, *e.g.*, *Unida*, *supra*. Where, however, there is evidence that an employer has contracted out its work, and thus discharged its employees, for the specific purpose of escaping obligations to pay benefits, the intent requirement is met. See, *e.g.*, *Seaman*, *supra*; *Gavalick*, *supra*.

This case was decided on a motion to dismiss the complaint for failure to state a claim, which must be denied unless it appears beyond doubt that the plaintiffs can prove no set of facts in support of their claim that would entitle them to relief. *Conley* v. *Gibson*, 355 U.S. 41, 45-46 (1957). Petitioners allege that respondents entered into a scheme to interfere with their employment relationship with SFTS—in essence, to effect their discharge from SFTS—in order to deprive them of ERISA-covered pension and welfare benefits. Pet. App. 29a (¶ 33), 30a (¶¶ 37, 38). Those allegations clearly state a claim under Section 510, as the court of appeals recognized in reversing the district court's dismissal of the complaint insofar as it alleged interference with petitioners' rights under the pension plan. See *id.* at 8a. And as the court of appeals further recognized in reinstating that claim, "questions of motivation and intent are not to be resolved at the pleading stage." *Ibid.*

The court of appeals reached a different result with respect to petitioners' claim of interference with their welfare benefits only because it believed that the non-vested nature of those benefits took them outside the protection of Section 510. As we have explained above, that conclusion is erroneous.

Respondents did not file a cross-petition for a writ of certiorari to challenge the determination that unlawful intent had been adequately pleaded in support of petitioners' claim of interference with their rights



under the pension plan. That claim therefore has been remanded to the district court for further proceedings. Because the allegations of unlawful intent that support petitioners' claim of interference with their welfare benefits are identical, the welfare benefits claim should also be reinstated and remanded for further proceedings in the district court.[15]

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[15] In the context of an organizational change such as a decision to sell or close down an operation, the District of Columbia Circuit requires Section 510 plaintiffs to show—in addition to a motive specifically to interfere with the attainment of benefits—a targeting of particular employees. *Andes* v. *Ford Motor Co.*, 70 F.3d 1332, 1337-1338 (1995). The *Andes* court reasoned that the term "discharge" in Section 510 refers only to individualized "discriminatory, viz targeted, actions," and does not generally apply to discharges that are part of "a corporate organizational change," because the statutory terms "discharge, fine, suspend, expel, discipline, [and] discriminate" are "all words that connote actions aimed directly at individuals." *Id.* at 1337. If Congress had intended Section 510 routinely to apply to such decisions, the D.C. Circuit stated, "it would surely have included the terms 'layoff' and 'termination.'" *Id.* at 1337-1338. *Andes* thus held that, "as applied to sale or closure of an entire unit, the plaintiffs can satisfy § 510 only by showing that some ERISA-related characteristic special to the unit * * * was essential to the firm's selecting the unit for closure or sale." *Id.* at 1338.

We do not believe that the term "discharge" in Section 510 can properly be read in such a limited fashion. In any event, petitioners' claim was dismissed at the pleading stage, and, because the *Andes* standard does not apply in the Ninth Circuit, it remains unclear whether, had they been confronted with the question, petitioners could have alleged that respondents' discharge and contracting-out decisions were motivated by "some ERISA-related characteristic special to" the Hobart Yard employees. At this stage, the precise nature of the welfare benefits at issue remains unclear, as do the relative expectations of Hobart Yard employees and other Atchison employees regard-

## CONCLUSION

The judgment of the court of appeals, to the extent it affirms the dismissal of petitioners' Section 510 claim based on interference with respondents' attainment of rights to welfare benefits, should be reversed, and the case should be remanded for further proceedings.

Respectfully submitted.

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ing their eligibility for those benefits. Given the preliminary state of the proceedings in this case, and the fact that the issue whether petitioners were "discharged" within the meaning of Section 510 was not raised or passed on in the court of appeals nor asserted in the Brief in Opposition, this Court should decline to consider it. See, *e.g.*, *Jenkins* v. *Anderson*, 447 U.S. 231, 234 n.1 (1980); see also *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970) ("Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them.").

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In The

# Supreme Court of the United States

October Term, 1996

INTER-MODAL RAIL EMPLOYEES ASSOCIATION, ET AL.,

*Petitioners,*

v.

ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL.

*Respondents.*

**On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

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## QUESTION PRESENTED

Section 510 of ERISA, 29 U.S.C. § 1140, makes it unlawful to "discharge . . . or discriminate against a participant . . . for the purpose of interfering with the attainment of any rights to which such participant may become entitled under the plan" or under provisions of ERISA. The question presented for review is:

Does Section 510 impose restrictions on an employer's right to subcontract or outsource work, where the employer's reasons include the desire to reduce the cost of a collectively-bargained employee welfare benefit plan, and where such actions are taken in accordance with the collective bargaining process mandated by the National Labor Relations Act?

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## STATEMENT OF THE CASE

The Atchison, Topeka and Santa Fe Railway Company ("Santa Fe")[1] owned a railroad terminal in Los Angeles, California, known as the Hobart Terminal or Hobart Yard. (Pet. App. 24a, ¶13.) For several years prior to 1990, the Hobart Terminal was operated by a wholly-owned subsidiary of Santa Fe, Santa Fe Terminal Services ("SFTS"). (*Id.* at 25a, ¶15.) Santa Fe allegedly exercised "day-to-day" control over the operations of SFTS at the Hobart Terminal. (*Id.* at 22a, ¶8.) SFTS' employees at the terminal were represented for purposes of collective bargaining by locals of the Teamsters Union ("Union"), (*id.* at 26a, 27a, ¶¶19, 23), with which SFTS had a collective bargaining agreement that provided for a "Teamsters Union health and welfare benefit fund," as well as various other benefits to these employees.[2]

In early 1990, Santa Fe notified SFTS that it was terminating its contract with that company, and would solicit "bids" on the work at the Hobart Terminal. (Pet. App. 27a, ¶22.) Shortly thereafter, SFTS notified the

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[1] Santa Fe is the predecessor of the Burlington Northern and Santa Fe Railway Company.

[2] Petitioner Inter-Modal Rail Employees Association's ("Association" or "Petitioner") complaint was dismissed under Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim. In the procedural posture of the case in this Court, the well-pleaded allegations in the Association's complaint must be accepted as true solely for purposes of this proceeding. The factual recitation in this brief is based upon the complaint, upon the representations of the Association in its brief filed herein, and upon ITS' Request to the Court to Take Judicial Notice.

Union that it might have to cease operations at the Hobart Terminal. (*Id.* at ¶23.) As a result of the bidding, the contract to perform work at the Hobart Terminal was awarded to Respondent In-Terminal Services ("ITS"). (*Id.* at ¶26.) ITS invited all of the Union-represented employees to apply for a position, and upon assuming operations at the Hobart Terminal, hired them, including the individual Petitioners. (Pet. Brief at 4; Pet. App. 28a, ¶29.) After the change, these individuals, now employees of ITS, continued to be represented by the Union, and to be covered by a collective bargaining agreement that provided for health benefits under a Teamster-sponsored plan.[3] Under the new collective bargaining agreement, however, "contributions and benefits" were less than they had been under the collective bargaining agreement between SFTS and the Union. (Pet. App. 28a, ¶30.) ITS did not continue contributions on behalf of these employees to the Railroad Retirement Board.[4] (*Id.*) There is no hint in the record, and certainly no allegations in the complaint, that the Union challenged the termination of SFTS' employees at the Hobart Yard, or ITS' hire of these employees under modified terms and conditions of

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[3] The complaint does not specifically allege that ITS had a collective bargaining agreement with the Union. However, ITS could not legally make contributions to union pension and health and welfare funds on behalf of these employees in the absence of such an agreement. *See* 29 U.S.C. § 186(c)(5). Accordingly, the existence of this continuing collective bargaining relationship is necessarily implied by the complaint, and may be considered in determining a motion under Rule 12(b)(6).

[4] As a "non-railroad employer," (Pet. Brief at 4), ITS had no obligation to contribute to the Railroad Retirement Board.



employment.[5] As set forth in ITS' Request to the Court to Take Judicial Notice,[6] no unfair labor practice charges were filed in connection with the events upon which the complaint is based, nor did the Union file any grievances or lawsuits challenging the decision to subcontract.[7]

Despite the Union's acquiescence in this change of terminal operators, on July 17, 1992, over two years after ITS assumed operation of the Hobart Terminal, five former SFTS (then ITS) employees, together with the Association apparently formed for this express purpose,[8]

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[5] The Union did file a claim under the WARN Act, 29 U.S.C. § 2101 *et seq.*, that resulted in SFTS' liability for six days pay. *Wholesale & Retail Employees (Teamsters) v. Santa Fe Terminal Services, Inc.*, 826 F.Supp. 326 (C.D. Cal. 1993).

[6] The Court may take judicial notice under Rule 201 of the Federal Rules of Evidence of the absence of any unfair labor practice charges, grievances or lawsuits. Such notice may be taken "at any stage of the proceeding," Rule 201(f), and may be considered in connection with a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure. *Kramer v. Time Warner, Inc.*, 937 F.2d 767 (2d Cir. 1991) (judicial notice of content of public records submitted to SEC properly considered in Rule 12(b)(6) motion).

[7] As discussed below, ITS' conduct was entirely in accord with the National Labor Relations Act. Indeed, ITS went beyond what that statute requires. ITS' actions in hiring Petitioners and all of their co-workers, recognizing the Union, and negotiating a successor collective bargaining agreement with the Union, none of which is a requirement under the NLRA, appear to form the basis for Petitioners' claims that ITS "conspired" with the other Respondents to reduce Petitioners' health benefits, and thereby violate Section 510.

[8] The Ninth Circuit held that the Association lacked standing to bring this action. (Pet. App. 6a.) That issue is not before the Court.

brought this action. Petitioners alleged that Santa Fe, SFTS and ITS "conspired" together to violate Section 510 of ERISA, 29 U.S.C. § 1140. (Pet. App. 30a, ¶37.) Petitioners primarily based this claim on the cessation of contributions to the Railroad Retirement Board, but also assert that the reduction in "contributions" and "benefits" under the Teamster-sponsored pension and health and welfare plans was a violation of Section 510. (*Id.* at ¶38.)

The district court dismissed all of Petitioners' claims on the pleadings. On appeal, the Ninth Circuit held, *inter alia*, that the Section 510 claims based upon the Teamster health plan were properly dismissed. The court below reasoned that Section 510 "does not prohibit an employer from altering the package of medical benefits that it provides its employees, but only from interfering with an employee's use of the benefits provided." (Pet. App. 8a, *citing DeVoll v. Burdick Painting, Inc.* 35 F.3d 408, 411 (9th Cir. 1994). An employer is free under ERISA to amend or entirely eliminate a health benefit plan, the court explained, because "existence of a present 'right' is a prerequisite to section 510 relief, and employees have no present 'right' to future, anticipated welfare benefits." (Pet. App. 9a, *citing West v. Greyhound Corp.*, 813 F.2d 951, 954 (9th Cir. 1987). For the same reason, the court held, the modification of Teamster health benefits that resulted from Santa Fe's decision to subcontract operations at the Hobart Terminal to ITS, and ITS' negotiations with the Union, was not a violation of Section 510. (*Id.*)



## SUMMARY OF ARGUMENT

This Court has granted certiorari on the question of whether these facts and allegations present a viable claim under Section 510 with respect to the Teamster health plan. Nothing in the language or legislative history of Section 510 supports the sweeping assertions in Petitioners' and the government's briefs, that an employer violates Section 510 if it decides to subcontract or outsource work based in part on a desire to reduce or eliminate the future costs of an employee welfare benefit plan. ITS does not reiterate the authorities and arguments set forth in Respondent Santa Fe's brief on this question. However, wholly apart from its consideration of the strained and unjustifiable interpretation of Section 510 advanced by Petitioners and *amici curiae*, the Court must examine the larger context in which these issues arise.

What Petitioners and the government gloss over is the fact that the modification to the employee welfare benefit plan at issue in this case was the product of permissible subcontracting and collective bargaining between ITS and the Union. According to the complaint, Santa Fe essentially decided to subcontract the intermodal work at the Hobart Terminal previously performed by SFTS employees.[9] The Union, as the exclusive collective bargaining representative, received notice of this decision, and of the identity of SFTS' successor. ITS, as

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[9] The complaint alleges that Santa Fe controlled SFTS. (Pet. App. 22a, ¶8.) To simplify the issue presented, ITS assumes, but does not concede, that Santa Fe and SFTS were in fact joint employers of the Hobart Terminal employees, and that Santa Fe's decision was to subcontract work at this terminal to ITS.

the successor employer, negotiated a new collective bargaining agreement with the Union that included the modified health benefits. Under these circumstances, acceptance of the interpretation of Section 510 that Petitioners and the government advance would eviscerate decades of case law under the National Labor Relations Act, 29 U.S.C. § 151 *et seq.*, and upset the careful balancing among the various economic interests involved in a decision to subcontract that this Court has crafted under that statute.

This Court has long recognized that an employer's decision to subcontract a portion of its business may be a proper subject of collective bargaining, regardless of whether the decision is motivated by labor costs. So long as the employer meets its obligation to bargain with the representative of its employees, it is free to subcontract a portion of its business, and may base that decision on labor costs, including the cost of fringe benefit contributions, such as contributions to a union health plan. By the same token, a subcontractor that hires the majority of the employees likely will be a "successor," with certain rights and obligations under the NLRA. One of the rights generally enjoyed by a successor is the right to establish its own initial terms and conditions of employment for workers formerly employed by the contracting entity. Here again, so long as the successor meets its obligations to bargain with the pertinent labor organization, it is free to insist upon health benefits that are different from those enjoyed by employees before the subcontracting.

If Petitioners' position were accepted, it would have a devastating impact on the balance of interests of employees and employers in this context. Indeed, it



would be a rare case in which an employer would be able to escape a federal lawsuit, where the employees who were laid off were provided with a health plan. As the government has expressly stated in its brief:

> Where . . . there is evidence that an employer has contracted out its work, and thus discharged its employees, for the specific purpose of escaping obligations to pay benefits, the intent requirement is met. (US. Brief 22.)

Of course, there is no allegation here that anyone was "escaping" any payment of "benefits," only that Santa Fe and SFTS sought to reduce the cost of such benefits. In the vast majority of subcontracting decisions, a motivation, perhaps even the primary motivation, will be labor costs, a component of which is very often health plan costs. Employers have always been able to consider such costs in making a decision to subcontract. Under Petitioners' and the government's view, however, if employees are covered by a health plan, the costs of that plan can never be considered in deciding to subcontract work performed by these employees, to sell that portion of the business, or simply discontinue the business entirely.

It is no answer, as the government suggests, that an employer is free to eliminate the health plan before subcontracting. Where, as here, the contracting company is subject to a collective bargaining agreement, the **required** method of amending or terminating a health plan is through collective bargaining. That is precisely what occurred in this case. Indeed, the necessary implication of Petitioners' and the government's position is that once an

employer has agreed to a pension or health plan in collective bargaining, it can never negotiate a reduction in the contribution rates or prospective benefits under that plan, if its purpose is to reduce its costs. There is no support for this position in law or logic.

In sum, the interpretation of Section 510 for which Petitioners and the government argue is wrong, is squarely at odds with well-settled law under the NLRA and related statutes, and if adopted by the Court, would essentially overrule this Court's pronouncements on subcontracting and successorship under the NLRA. For these reasons, that interpretation should be rejected.

## ARGUMENT

### I. SETTLED LAW UNDER THE NATIONAL LABOR RELATIONS ACT PERMITS THE CONDUCT AT ISSUE IN THIS CASE.

#### A. Overview of Subcontracting and Successorship Principles Under the National Labor Relations Act.

In order to place the interpretation of Section 510 that Petitioners and the government urge in a proper context, it is necessary to review certain principles of law that have evolved under the National Labor Relations Act, 29 U.S.C. § 151 *et seq.* ("NLRA"), the federal statute perhaps most involved in the events described in the complaint. In particular, two areas of law under the NLRA are critical to this case. The first concerns an employer's right to subcontract work performed by union-represented employees, and the obligations it has to bargain with the



union about the decision to subcontract. The second area concerns the law of "successorship," including the obligations of a purchaser or subcontractor vis-a-vis the employees of the seller or contracting company. Examination of these two areas of NLRA-law reveal that what occurred in this case was appropriate and sanctioned by decades of case authority, and more importantly, that recognition of a potential claim under Section 510 of ERISA in these circumstances would seriously distort, indeed destroy, the careful balance among the interests of employer, employees and union in such situations established by numerous decisions of this Court.

The NLRA is a comprehensive statutory scheme that regulates the relationship between employers in interstate commerce and their employees. The NLRA thus seeks to enhance the free flow of commerce by encouraging employers and employees to resolve their differences and disputes through collective bargaining.[10] Indeed, the act "was framed with an awareness that refusals to confer and negotiate had been one of the most prolific causes of industrial strife." *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S.

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[10] Section 1 of this statute provides in pertinent part:

> Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees. 29 U.S.C. § 151.

203, 85 S.Ct. 398, 13 L.Ed.2d 233 (1964), *citing, NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 42-43, 57 S.Ct. 615, 81 L.Ed. 893 (1937). To this end, the statute guarantees employees "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, . . . . " 29 U.S.C. § 157. These employee rights are secured by restrictions on the conduct of employers and labor organizations in the economic conflict that is collective bargaining. *Id.* at § 158(a), (b), (c) & (e). The agency established under the statute, the National Labor Relations Board ("NLRB" or "Board"), is tasked with acting both as neutral referee between labor and management, and enforcer of the interests and rights set forth in the act when either side commits an unfair labor practice.

One of the fundamental obligations the NLRA imposes on both employers and unions is to bargain "in good faith with respect to wages, hours, and other terms and conditions of employment." 29 U.S.C. § 158(d). As this obligation has been interpreted by the Board and the federal courts, the subjects of collective bargaining have been divided into "mandatory," and "non-mandatory" matters. *See NLRB v. Wooster Division of Borg-Warner Corporation*, 356 U.S. 342, 349-50, 78 S.Ct. 718 (1958). Employers and unions are required to bargain about matters that are "mandatory" subjects of bargaining, and an employer may not unilaterally change any of the terms and conditions of employment of employees represented by a union, without bargaining with the union in good faith.[11] *Litton Financial Printing v. NLRB*, 501 U.S. 190, 198,

[11] Health benefits are, of course, a mandatory bargaining subject. *E.g., Stone Boat Yard v. NLRB*, 715 F.2d 441, 444 (9th Cir. 1983), *cert. denied*, 466 U.S. 937, 104 S.Ct. 1910, 80 L.Ed.2d 459 (1994). Accordingly, before an employer may alter the health benefits of union-represented employees, it must bargain in good faith with the union about such change.



111 S.Ct. 2215, 115 L.Ed.2d 177 (1991); *NLRB v. Katz*, 369 U.S. 736, 82 S.Ct. 1107, 8 L.Ed.2d 230 (1962).

An issue that has generated a great deal of litigation, and several opinions of this Court, is the question of when an employer's decision to subcontract work performed by union-represented employees, or any similar decision, such as to sell or close a portion of a business, or to transfer bargaining unit work to another location, is a mandatory bargaining subject. *Fibreboard Paper Products Corp. v. NLRB, supra; see also, First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 101 S.Ct. 2573, 69 L.Ed.2d 318 (1981). The resolution of this issue in any given situation turns primarily on the impact of the decision on employees, and on the perceived efficacy of collective bargaining as a means of affecting the decision. This Court has explained the basic framework of this issue as follows:

> Some management decisions, such as choice of advertising and promotion, product type and design, and financing arrangements, have only an indirect and attenuated impact on the employment relationship. . . . Other management decisions, such as the order of succession of layoffs and recalls, production quotas, and work rules, are almost exclusively "an aspect of the relationship" between employer and employee. *Chemical [and Alkali] Workers [v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 178, 92 S.Ct.

> 383, 30 L.Ed.2d 341 (1971)]. . . . [A] third type of management decision, . . . is akin to the decision whether to be in business at all. *First Nat'l Maintenance Corp.*, 452 U.S. at 676-77.

The "third type" includes the decision to subcontract, to sell, to discontinue or to transfer a portion of the employer's business. *Id.* In determining whether this type of decision is a mandatory subject of bargaining in any given situation, the Board and the courts usually consider whether the employer's motive was to lower its labor costs, by "reducing the work force, decreasing fringe benefit payments," and the like. *Fibreboard Paper Products Corp.*, 379 U.S. at 213-14. If the desire to reduce labor costs is a significant consideration, then the decision is more likely a matter that should be discussed with the employees' collective bargaining representative before implementation. *Id.* Nevertheless, a central, although often unstated premise in the cases concerning this issue, is that it is entirely appropriate for an employer to base a decision to subcontract on labor costs, including the cost of relevant fringe benefits such as pension and health and welfare. If labor costs are a significant factor in the decision, then bargaining, it is assumed, might result in concessions by the union or other economic solutions to the labor cost issue that would reduce or even eliminate the need to subcontract. In none of these cases, however, whether decided before or after enactment of Section 510 of ERISA, is there any suggestion that basing a decision to subcontract on a desire to reduce the cost of fringe benefits or other employee expenses is improper. To the contrary, so long as its bargaining obligations are met, an



employer generally has a right under the NLRA to subcontract a portion of its business, even if that means termination of employees. *NLRB v. Burns International Security Services, Inc.*, 406 U.S. 272, 281, 92 S.Ct. 1571, 32 L.Ed.2d 61 (1972); *Fibreboard Paper Products Corp., supra.*

The other area of NLRA law that is critical to consideration of Petitioners' claims is that of "successorship." This body of case law concerns the obligations of an entity that acquires the business or assets of another, and the circumstances under which the "successor" company may be required to assume the "predecessor's" collective bargaining agreements, to bargain with the union representing the predecessor's employees, and/or to remedy its unfair labor practices.

The question of whether an acquiring entity is a "successor," and thus potentially obligated to assume bargaining and/or contractual obligations of the predecessor, turns on whether there is a "substantial continuity" of business enterprise from one entity to the other. *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 43, 107 S.Ct. 2225, 2236 (1987). As a practical matter, a determination that a subcontractor is a "successor" under the NLRA usually turns on the composition of the new entity's work force. *Burns, supra; NLRB v. Cutter Dodge, Inc.*, 825 F.2d 1375 (9th Cir. 1987); *see also, Howard Johnson Co. v. Detroit Local Exec. Bd*, 417 U.S. 249, 94 S.Ct. 2236, 41 L.Ed.2d 46 (1974); *Golden State Bottling Co. v. NLRB*, 414 U.S. 168, 94 S.Ct. 414, 38 L.Ed.2d 388 (1973). Thus, if a majority of the new company's work force, measured at a time when it employs a "representative complement" of employees, was employed by the prior entity, then the

new company generally is a successor. *See Fall River Dyeing*, 482 U.S. at 46 fn. 12.

A "successor" company assumes the predecessor's obligation to bargain with any incumbent union. *Burns, supra; Fall River Dyeing, supra.* Nevertheless, the successor has the right to set the initial terms and conditions of employment of its employees in most cases. *Id.; Spruce Up Corporation*, 209 N.L.R.B. 194, *enf'd*, 529 F.2d 516 (4th Cir. 1975). Accordingly, and again in most cases, the successor is not required to assume any collective bargaining agreements that may be in place, but rather is merely obligated to bargain with the incumbent union after establishing unilaterally the initial terms and conditions of employment for its employees. *Id.* It is thus entirely proper for the successor company, including one that hires all of the predecessor's employees, to institute its own fringe benefit plans, even though they are different from or provide lesser benefits than those of the predecessor, or to provide no such plans at all.

With the foregoing principles in mind, we now turn to the events that generated Petitioners' claim.

### B. The Change in Teamster-Sponsored Health Benefits Resulting from the Subcontract to ITS Does Not Violate Section 510.

The events pleaded in the complaint as an alleged violation of Section 510 of ERISA are in fact eminently proper and indeed, dictated by NLRA successorship principles. The "new" employer, ITS, hired all of SFTS' employees and thereby assumed the obligations of a



"successor" to SFTS. As a successor, ITS had no obligation to assume SFTS' collective bargaining agreement with the Union, including the health plan adopted under that contract, but instead, had the right to establish its own initial terms and conditions of employment. In fact, ITS negotiated a new collective bargaining agreement with the Union as the exclusive bargaining representative of Petitioners and all their co-workers that provided for health benefits under a Teamster-sponsored plan. As alleged in the complaint, ITS' contribution rate to this plan was less than SFTS' rate had been, and the benefits provided under the plan were less than under the SFTS/Teamster plan. Nevertheless, the critical fact is that the process functioned precisely as it was supposed to under the NLRA principles set forth above. As a successor employer, ITS assumed an obligation to bargain with the Union and negotiated a contract that the Union signed. In short, the change in the Teamster-sponsored health plan was the proper outcome of good faith, collective bargaining, free from any Union claims of illegality or commission of unfair labor practices.

This result is no different from the consequences of any number of nondiscriminatory business transactions where the reorganization of a business or sale of assets results in the assumption of employer status by a new entity. Such transactions, involving the assumption of sponsorship of ERISA employee benefit plans by a new company, are commonplace and typically are motivated or necessitated by legitimate business or financial concerns. As such, the act of subcontracting and substituting ITS in the place of SFTS was simply the act of amending the health plan to substitute a new sponsoring employer.

The subcontracting arrangement did not, in and of itself, terminate the SFTS/Teamsters health plan with respect to the employees at issue or reduce the benefits available under the terms of the plan. The successor employer, ITS, continued to provide benefits to employees under the terms of a Teamsters health plan. Benefits were reduced pursuant to the plan amendment that resulted from the new collective bargaining agreement negotiated between the union and ITS. These actions plainly fall outside the strictures of Section 510.

The crux of Petitioners' claims under Section 510 is that the conduct of Santa Fe, SFTS and ITS that is expressly permitted, indeed fostered under the NLRA and the policies underlying that statute, may nevertheless be collaterally attacked under ERISA. The necessary implication of this premise is the virtual obliteration of carefully crafted principles and balancing of competing interests where an employer implements an economically-motivated change in the structure or direction of its business, and the evisceration of rights sanctioned under the NLRA. It also ignores the fact that collectively-bargained health plans that are subject to ERISA, are also subject to the NLRA and to Section 302(c)(5) of the Labor-Management Relations Act, 29 U.S.C. § 186(c)(5). As this Court has recognized, the principles under those latter statutes often control, even if ERISA may provide a remedy for or restrict the conduct at issue. *E.g., Laborers Health & Welfare Trust Fund etc. v. Advanced Lightweight Concrete Co.*, 484 U.S. 539, 108 S.Ct. 830, 98 L.Ed.2d 936 (1988).

The circumstances presented here amply demonstrate the conflict that arises if Petitioners' interpretation



of Section 510 is accepted. Santa Fe could and did subcontract work at the Hobart Terminal. The terms of the Union's agreement with SFTS are not part of the record here, and there is no way to determine whether that contract contained any provisions pertinent to SFTS' cessation of work at the terminal, or Santa Fe's possible subcontracting of that work. Assuming that Santa Fe and SFTS were in fact a single entity, as the complaint here strongly implies, the Union certainly could have negotiated a collective bargaining agreement that placed restrictions on subcontracting, or that required Santa Fe to impose the existing collective bargaining agreement on any successor to SFTS. *See Howard Johnson*, 417 U.S. at 258 n. 3. Similarly, the Union could have sought in negotiations with ITS that it would assume the collective bargaining agreement between the Union and SFTS, in order to continue the same health plan. The common thread shared by all of these possible scenarios is that they fundamentally are based upon the give and take of collective bargaining.

If Petitioners were correct in their interpretation of Section 510, however, Santa Fe would have to have **required** ITS to assume SFTS' obligations under the collective bargaining agreement, at least to the extent necessary to impose on ITS the same levels of employee benefits provided by the terms of the SFTS/Teamster plan. ITS, in turn, would have to have hired all of SFTS' employees because the termination of even a single employee, and resulting loss of future health benefits to that employee, presumably would constitute a "discharge" in violation of Section 510. Thus, here, and in every subcontracting situation, or for that matter, in

every sale or partial sale of a business involving a collectively-bargained health benefit or pension plan, the parties to the transaction would have to employ all the employees and sponsor the identical plan terms from one employer to the successor, or violate Section 510.

The claim that Santa Fe acted out of a desire to reduce the cost of health and pension benefits, and that only in such cases would there be a violation of Section 510, does not lessen the impact of Petitioners' contentions. It is likely that labor costs, including fringe benefit costs, are almost always a factor in an employer's decision to subcontract work, to sell, discontinue or reorganize a portion of its business, to relocate a facility, or any similar organizational or structural business decisions. NLRA law expressly recognizes this fact, and sanctions consideration of such costs. Indeed, failure to consider such cost factors in any decision that involved termination of employees receiving health benefits would not only be imprudent from a business standpoint, it would turn the question of whether the union had to be consulted on the decision completely on its head. Employers would have every incentive to ignore labor costs as an issue in such situations, thereby reducing or eliminating the role of the incumbent union.

It is also no answer to the problem outlined above that there are other ways of reducing fringe benefit costs than subcontracting. The government argues, for example, that "[t]he proper way for employers to reduce benefits-related costs is to amend or terminate the plan, according to the procedures prescribed in ERISA and the plan itself." (U.S. Brief at 11.) With all due respect, that is precisely what occurred in this case. In connection with



this subcontracting decision, ITS negotiated an amendment to the Teamster plan at issue. This was accomplished within the letter and intent not only of the NLRA, which governs the employment relationship, but also Section 302(c)(5) of the Labor-Management Relations Act, 29 U.S.C. § 186(c)(5), which governs the sponsorship and administration of the plan at issue. Under these statutes, SFTS could not unilaterally amend or terminate this health plan. Since the plan was mandated by an existing collective bargaining agreement, the proper procedure for "amendment" or "termination" was collective bargaining, subject to the collective bargaining agreement[12] and the express provisions of the plan itself. Accordingly, if Petitioners and the government were correct, there would be no proper way to "amend" or "terminate" such a plan.[13]

In sum, the interpretation of Section 510 urged by Petitioners and *amici* would seriously and adversely

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[12] Once agreement on a mandatory bargaining subject, such as a health benefit plan, is reached and embodied in a collective bargaining agreement, unless the parties have expressly agreed to renegotiate that subject during the life of the contract, they have no obligation to do so. *See NLRB v. Lion Oil Co.*, 352 U.S. 282, 77 S.Ct. 330 (1957); 29 U.S.C. § 158(d).

[13] Of course, this problem only occurs when there is an existing collective bargaining agreement. A non-union employer that intends to subcontract, with the result that employees will be laid off, may "terminate" a health plan shortly before the lay off. Presumably, under the government's method of avoiding a violation of Section 510, such an empty formality would suffice. ITS does not imply, however, that if SFTS had not had a collectively-bargained health plan, then Section 510 could have been violated. That issue is simply not before the Court.

impact the balance of rights and obligations crafted by the NLRB and the courts under the National Labor Relations Act, and related statutes. Further, it would significantly impair, or entirely eliminate an employer's right to structure its operations, and to expand or contract the scope of its business, whether through subcontracting, sale, plant closure or otherwise, a right this Court has repeatedly recognized and upheld. For these reasons, that interpretation must be rejected.

## II. SECTION 510 DOES NOT SUPPORT A CLAIM UNDER THE ALLEGATIONS PRESENTED HERE.

Petitioners and *amici* may respond to the disturbing implications of their reading of Section 510 with the assertion that the plain language of that statute supports their position, and that these are policy arguments that should be addressed to Congress and not to this Court. As already noted, ITS will not repeat arguments and authority presented by Santa Fe to the Court concerning the proper interpretation of Section 510. Nevertheless, and in light of the foregoing discussion, ITS offers a few additional thoughts for the Court's consideration on this issue.

The actions prohibited by Section 510 are to "discharge, fine, suspend, expel, discipline, or discriminate" against employees. Of these prohibited actions, to "discharge" and/or "discriminate" are the only potential actions at issue in this case. Petitioners assume that because they and their co-workers were laid off by SFTS (only to be hired by ITS the next day), that the action at issue here, alleged subcontracting and resulting lay off, is



a "discharge" within the meaning of the statute. Considering the various prohibited actions in context, however, it appears that the mass lay off of employees due to a sale of a business or subcontracting is not an action that is contemplated by this term. To the contrary, the thrust of Section 510, like other discrimination statutes, seems to be the disparate treatment of individuals or groups of employees, within a larger group that is treated more favorably. While there is no legislative history that bears on this issue,[14] the term "discharge" does not reasonably include the lay off and next-day hire at issue here.[15]

By the same token, there was no discrimination, where all of the SFTS employees were treated the same way. Section 510 does not prohibit the identical treatment of a large group of employees based merely on the fact that they all were eligible for health benefits. Moreover, consideration of health benefit contribution costs is not "discrimination" unless the employer takes away an existing right. Here, there are no allegations that such actions occurred. Rather, all that Petitioners and their co-workers allegedly lost was the expectancy of future health benefits at a certain level. No right to those future benefits had

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[14] At least, ITS has not found any pertinent comments on this issue one way or the other in the over 5000 pages of legislative history on ERISA.

[15] The government suggests that the issue of whether the allegations in the complaint could establish a "discharge" within the meaning of Section 510 is not before the Court. (U.S. Brief at 25, fn. 15.) Contrary to this suggestion, the proper interpretation of Section 510 is the issue upon which the Court granted certiorari, and consideration of all the elements of this section is central to the issues presented.

"accrued," or "vested," and these employees therefore lost no present right.[16]

This conceptual problem also infects the mistaken interpretation of the phrase in Section 510 that is the subject of much more contention here, that the prohibited action must be taken "for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan." 29 U.S.C. § 1140. Implicit in this phrase is the concept that a violation of Section 510 necessarily entails treatment of an individual or group of individuals differently from other employees under an employee benefit plan. The archetypal violation

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[16] The distinction among an "expectancy," an "accrued right," and a "vested right" is vital to understanding the issue presented. For example, an employee who is just hired has an expectancy that he will receive pension benefits in the future, but he has no entitlement of any kind at that point. After the employee works for a few years, he has "accrued" time as a service credit. While that credit is a present right, unless the employee works for a minimum number of years, he may never actually receive a pension. He thus does not have a "vested" benefit until satisfying the conditions for vesting, usually a minimum number of continuous years of service. Nothing in ERISA prohibits interference with an expectancy, or from changing the rules on accrual and vesting in the future.

Health benefits, unlike pension benefits, except perhaps in hypothetical situations not present here, do not accrue or vest. Rather, employees only have an expectancy that benefits will continue in the future. ERISA, and in particular Section 510, does not prohibit in any fashion the reduction of health benefits in the future precisely because they do not accrue or vest. This is the essential distinction drawn by the Ninth Circuit below, between "altering the package of medical benefits" and "interfering with an employee's use of benefits provided." (Pet. App. 8a.)



of Section 510, for example, is the termination of an employee shortly before his pension benefits vest, in order to deprive him of those benefits. In that situation, the individual is terminated, while other employees who are or may become vested are not. Furthermore, and perhaps more importantly, the situation involves continuation of the pension plan itself, for without continuation of the plan, there are no benefits to which anyone "may become entitled."

This implicit requirement in Section 510, that the plan itself continue with respect to similarly situated employees, helps explain why an employer has the right to terminate or amend an employee benefit plan at any time, without running afoul of Section 510. As this Court recently recognized, "[e]mployers or other plan sponsors are generally free under ERISA, for any reason at any time, to adopt, modify, or terminate welfare plans," *Curtiss-Wright Corp. v. Schoonejongen*, ___ U.S. ___, 115 S.Ct. 1223, 1228 (1995), and an amendment of an employee welfare benefit plan that deprives beneficiaries of some of the benefits of the plan in the future "is not a cognizable complaint under ERISA." *Id.* If a health benefit plan is terminated, then there simply are no prospective benefits to which anyone "may become entitled," and Section 510 therefore does not apply. In other words, the employees have lost a mere "expectancy," which is not protected under ERISA. (*See fn.* 15, *supra.*)

In essence, the act of subcontracting and substituting ITS in the place of SFTS had the necessary and inescapable consequence of amending the health plan to substitute a new sponsoring employer. When Santa Fe took the work away from SFTS, which resulted in the lay off of all

SFTS' employees at the terminal, SFTS had no continuing obligation to contribute to the Teamsters health plan because none of its employees continued to perform work covered by the collective bargaining agreement. At that point, none of these employees could ever "become entitled" to future benefits under that plan, because SFTS ceased to have any obligation to contribute, as did Santa Fe, if it ever had one. As such, the actions in question are an "amendment" of the original health plan, that plainly falls outside the strictures of Section 510.

Petitioners' and the government's argument in response to this presumably will be that SFTS' employees would have "become entitled" to future health benefits under SFTS' Teamster-sponsored plan, if Santa Fe had not subcontracted the work to ITS. This argument simply proves too much. If the phrase in question is interpreted in this manner, then any elimination of a health plan would also necessarily be prohibited by Section 510. In any case of plan termination, employees could argue that but for the termination they would have "become entitled" to future benefits under the plan, and that such termination is "discrimination" against the entire covered group. Such an argument is not substantively distinguishable from that advanced by Petitioners, that but for the subcontracting, SFTS employees would have become entitled to benefits under the existing plan. Since all concede, however, that outright termination of a plan is not a prohibited act, Petitioners' interpretation stretches the phrase "may become entitled" far beyond its original intent and plain meaning.

In short, the reduction of health benefits at issue here lies outside of Section 510's prohibitions, the same as



does an employer's unilateral decision to reduce benefits in the future. This is especially true because the modification of the Teamster-sponsored plan was accomplished in full accord with long-settled principles and procedures under the NLRA and the terms of the plan. This "amendment" is plainly allowed under ERISA, and is not prohibited by Section 510.

## CONCLUSION

ITS respectfully submits that none of Respondents could be found liable for a violation of Section 510 on the facts pleaded in the complaint. The Court should so rule.

DATED: February 11, 1997

Respectfully submitted,

JEFFER, MANGELS, BUTLER
& MARMARO LLP
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*Attorneys for Respondent*
*In-Terminal Services*

## APPENDIX

## RESPONDENT IN-TERMINAL SERVICES' REQUEST TO TAKE JUDICIAL NOTICE

---

Respondent In-Terminal Services ("ITS") hereby requests the Court to take judicial notice of the following facts, pursuant to Rule 201 of the Federal Rules of Evidence. This request is based upon the declaration of Patrick W. Jordan, Esq., set forth herein below. The Court should take notice of the following facts:

1. Teamsters Union, Local No. 63, and Teamsters Union, Local No. 208, affiliated with the International Brotherhood of Teamsters, AFL-CIO (jointly "Union"), represented the employees of Respondent Santa Fe Transfer Services ("SFTS") at the Hobart Terminal in Los Angeles County, at all times pertinent to the complaint in this case, and specifically, in March 1990.

2. The Union did not file suit in state or federal court challenging the decision of Respondent Atchison, Topeka and Santa Fe Railway Company ("Santa Fe") to transfer work at the Hobart Terminal in or about March 1990, from SFTS to ITS, or challenging the transfer itself. The only legal action taken by the Union was to file a lawsuit against Santa Fe and SFTS alleging a violation of the Worker Adjustment and Retraining Notification Act, 29 U.S.C. § 2101 *et seq. Wholesale & Retail Food Employees (Teamsters) Local 63 v. Santa Fe Terminal Services, Inc.*, 826 F.Supp. 326 (C.D. Cal. 1993).

3. The Union did not file any unfair labor practice charges challenging the decision of Respondent Santa Fe

to transfer work at the Hobart Terminal in or about March 1990, from SFTS to ITS, or challenging the transfer itself.

4. The Union did not file any grievances under the collective bargaining agreement it had with SFTS challenging the decision of Respondent Santa Fe to transfer work at the Hobart Terminal in or about March 1990, from SFTS to ITS, or challenging the transfer itself.

5. ITS negotiated a collective bargaining agreement with the Union in March 1990 that provided for health benefits under a Teamsters-sponsored, multi-employer plan.

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**DECLARATION OF PATRICK W. JORDAN IN SUPPORT OF REQUEST TO TAKE JUDICIAL NOTICE**

I, Patrick W. Jordan, Esq., state and declare as follows:

1. I am an attorney licensed to practice law in the State of California, and am a member of the bar of the United States Supreme Court. I make this declaration of my own personal knowledge, and if called upon to do so, I could and would competently testify to the truth of each and ever fact set forth in this declaration.

2. Since the late 1980's I have represented Respondent In-Terminal Services ("ITS") for purposes of labor relations, union negotiations and related administrative and litigation matters. ITS was a division of Respondent



Mi-Jack Products, Inc. at the time my representation began. ITS is now a separate corporation, and a wholly-owned subsidiary of Mi-Jack Products, Inc. I represented ITS in all labor litigation matters in California since the late 1980's, and in particular, have represented ITS in all such matters that have arisen concerning the Hobart Terminal in Los Angeles. I am counsel for ITS in the matter now pending before the Court, and in other litigation brought by Petitioner Inter-Modal Rail Employees Association ("Association") against ITS, including *Inter-Modal Rail Employees Association, et al. v. Burlington Northern and Santa Fe Railway Company, et al.*, San Francisco Superior Court Case No. 975 406. In addition, I am counsel for ITS in a lawsuit brought by the Union in connection with ITS' cessation of work at the Hobart Terminal in January 1995, now pending in the United States District Court for the Central District of California, captioned and docketed in that court as *Teamsters Local 63, International Brotherhood of Teamsters, AFL-CIO v. In-Terminal Services, et al.*, USDC Case No. 95-8593 GHK (Ex). I have been counsel for ITS in connection with all grievances filed by the Union at the Hobart Terminal from March 1990 through 1995 that progressed to a demand for arbitration, and all unfair labor practice charges filed by the Union concerning the Hobart Terminal during that same time period. I also was counsel and chief negotiator in the negotiation of a collective bargaining agreement between the Union and ITS in March 1990 concerning employees at the Hobart Terminal.

3. To the best of my recollection, the Union did not file any lawsuits, state or federal, any unfair labor practice charges, or any grievances challenging in any way

the transfer of work at the Hobart Terminal from Santa Fe Transfer Services to ITS that occurred in or about March 1990. The only legal action taken by the Union was to file a lawsuit against Santa Fe and SFTS alleging a violation of the Worker Adjustment and Retraining Notification Act, 29 U.S.C. § 2101 *et seq.*, claiming that SFTS' employees had been given insufficient notice of termination under that statute. This suit resulted in a published opinion, *Wholesale & Retail Food Employees (Teamsters) Local 63 v. Santa Fe Terminal Services, Inc.*, 826 F.Supp. 326 (C.D. Cal. 1993). At all times from and after ITS assumption of work at the Hobart Terminal in or about March 1990, until Santa Fe terminated ITS' contract in January 1995 for work at that terminal, ITS had a collective bargaining agreement with the Union covering employees at the Hobart Terminal. The collective bargaining agreement I negotiated on ITS' behalf in March 1990 obligated ITS to make contributions on behalf of employees to a Teamster-sponsored, multi-employer health benefit plan.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 11th day of February, 1997, at San Francisco, California.

/s/ _____
PATRICK W. JORDAN

Supreme Court, U.S.
FILED
FEB 11 1997
CLERK

No. 96-491

# In the Supreme Court of the United States

OCTOBER TERM, 1996

INTER-MODAL RAIL EMPLOYEES ASSOCIATION, ET AL., PETITIONERS

*v.*

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL., RESPONDENTS

**On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## BRIEF FOR RESPONDENTS THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY AND SANTA FE TERMINAL SERVICES, INC.

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## QUESTION PRESENTED

Section 510 of ERISA, 29 U.S.C. § 1140, makes it unlawful to "discharge, fine, suspend, expel, discipline, or discriminate against a participant * * * for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan" or under ERISA. The question presented is:

Whether Section 510 authorizes a federal lawsuit against an employer who undertakes structural, cost-cutting measures (such as layoffs or outsourcing of work) that result in the loss of jobs by ERISA-plan participants, where the employer's purpose includes a desire to reduce costs attributable to employee welfare benefit plans.

## RULE 24.1(b) STATEMENT

Respondent The Atchison, Topeka and Santa Fe Railway Company's parent corporation is Santa Fe Pacific Corporation. Its non-wholly owned subsidiaries consist of Alameda Belt Line, Belt Railway Company of Chicago, Central California Traction Company, Houston Belt and Terminal Railway Company, Kansas City Terminal Railway Company, Oakland Terminal Railway Company, St. Joseph Terminal Railroad Company, Sunset Railroad Company, Texas City Terminal Railway Company, Wichita Union Railway Company, and TTX Company. Santa Fe Pacific Corporation's parent corporation is Burlington Northern Santa Fe Corporation; it has no non-wholly owned subsidiaries.

Respondent Santa Fe Terminal Services, Inc.'s parent corporation is The Atchison, Topeka and Santa Fe Railway Company. It has no non-wholly owned subsidiaries.



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# In the Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-491

INTER-MODAL RAIL EMPLOYEES ASSOCIATION, ET AL., PETITIONERS

*v.*

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL., RESPONDENTS

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**On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

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## BRIEF FOR RESPONDENTS THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY AND SANTA FE TERMINAL SERVICES, INC.

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### STATEMENT

This action arises out of the efforts of respondent The Atchison, Topeka and Santa Fe Railway Company ("Santa Fe") to reduce the cost of its operations at the company's Hobart rail yard terminal in Los Angeles. Santa Fe terminated a contract with its subsidiary, respondent Santa Fe Terminal Services, Inc. ("SFTS"), and entered into a contract with an unrelated company, respondent In-Terminal Services Division ("In-Terminal"), to perform the cargo-handling work at Hobart yard. In accordance with the applicable collective bargaining agreement, SFTS then furloughed the employees who had been doing the work; all

were offered (and many accepted) new positions doing the same work for In-Terminal.

Petitioners, five former SFTS employees,[1/] brought this action alleging, among other things, that Santa Fe, SFTS and In-Terminal had engaged in a "conspiracy" to discharge them for the purpose of "interfering with the attainment" of rights to which petitioners may become entitled under ERISA-qualified benefit plans, in violation of Section 510 of ERISA, 29 U.S.C. § 1140. The district court dismissed petitioners' complaint for failure to state a claim upon which relief could be granted. The court of appeals affirmed in part and reversed in part, holding, among other things, that petitioners had stated a valid claim insofar as they alleged that they were discharged for the purpose of preventing pension benefits from vesting but not insofar as they were claiming an interference with the use of "future, anticipated welfare benefits." (Pet. App. 9a). Only the latter holding is at issue in this Court.

1. Enacted in 1974, ERISA is "a comprehensive statute designed to promote the interests of employees and their beneficiaries in employee benefit plans." *Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85, 90 (1983). The statute defines the term "employee benefit plan" to include both "employee pension benefit plan[s]," which provide retirement income, and "employee welfare benefit plan[s]," which provide, among other things, health care, accident, disability, death and unemployment benefits. 29 U.S.C. § 1002(1)-(3). Among other things, ERISA "imposes participation, funding, and vesting requirements on pension plans" and "sets various

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[1/] In addition to the five individual petitioners, the suit was brought by an ad hoc association of former SFTS employees, the Inter-Modal Rail Employees Association. Pet. App. 22a. The court of appeals held that the Association did not have standing (*id.* at 6a), and this Court declined to review that issue.



uniform standards, including rules concerning reporting, disclosure, and fiduciary responsibility, for both pension and welfare plans," but it "does not mandate that employers provide any particular benefits." *Shaw*, 463 U.S. at 91.

As its title suggests, the Employee Retirement Income Security Act was largely aimed at enhancing the security of the retirement income of pension participants. The congressional committees that developed the legislation heard extensive testimony about how workers lost pension benefits after many years of service because of vesting rules that required lengthy service before eligibility, discharge on the eve of vesting, inadequate pension plan funding, and plan termination caused by business failures. S. Rep. No. 93-127 at 11-13 (Apr. 18, 1973), *reprinted in* I Staff of Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, 94th Cong., *Legislative History of the Employee Retirement Income Security Act of 1974*, at 597-599 (Comm. Print 1976) ("*Legislative History*"); see also, *e.g.*, I *Legislative History* 212-215 (remarks of Sen. Bentsen); II *Legislative History* 1598-1606 (remarks of Sen. Williams).

In enacting the legislation, Congress found that

> despite the enormous growth in [employee benefit] plans many employees with long years of employment are losing anticipated retirement benefits owing to the lack of vesting provisions in such plans; that owing to the inadequacy of current minimum standards, the soundness and stability of plans with respect to adequate funds to pay promised benefits may be endangered; [and] that owing to the termination of plans before requisite funds have been accumulated, employees and their beneficiaries have been deprived of anticipated benefits * * * .

Pub. L. No. 93-406, § 2(a), 88 Stat. 832-833 (codified at 29 U.S.C. § 1001(a)). To address these serious concerns, Congress declared a national policy of "protect[ing] * * * the interests of participants in private pension plans and their

beneficiaries by improving the equitable character and the soundness of such plans by requiring them to vest the accrued benefits of employees with significant periods of service, to meet minimum standards of funding, and by requiring plan termination insurance." Pub. L. No. 93-406, § 2(c), 88 Stat. 833 (codified at 29 U.S.C. § 1001(c)).

To address the serious problem of loss of pension benefits after years of service, ERISA imposes detailed accrual, vesting, funding, and plan termination insurance requirements on pension plans. The statute requires that an employee's normal retirement benefit "accrue" — *i.e.*, be earned — more or less ratably during the period of the employee's participation in the plan. 29 U.S.C. § 1054. In addition, the statute requires that an employee's right to accrued benefits "vest" — *i.e.*, become nonforfeitable — either (1) by the time an employee has completed five years of service; or (2) if the plan provides for "incremental" vesting, at a rate of 20% per year commencing when the employee has completed three years of service; or (3) for multiemployer plans (such as those involved in this case), by the time an employee has completed ten years of service. 29 U.S.C. §§ 1053(a)(2)(A)-(C). ERISA also imposes extensive funding requirements on pension plans to ensure their financial viability (29 U.S.C. §§ 1081-1085b) and requires termination insurance to ensure that pension benefits promised by employers will be paid in the event of insolvency. 29 U.S.C. §§ 1301-1323. Congress chose to treat welfare plans very differently; none of ERISA's accrual, vesting, funding, and plan termination insurance requirements apply to welfare benefit plans. 29 U.S.C. §§ 1051(1), 1081(1). Because welfare benefits do not vest, employees are "free under ERISA, for any reason at any time, to adopt, modify, or terminate welfare plans." *Curtiss-Wright Corp.* v. *Schoonejongen*, 115 S. Ct. 1223, 1228 (1995), citing *Adams* v. *Avondale Industries, Inc.*, 905 F.2d 943, 947 (6th Cir. 1990).



Section 510 of ERISA, 29 U.S.C. § 1140, adds a related safeguard by "protect[ing] plan participants from termination motivated by an employer's desire to prevent a pension from vesting." *Ingersoll-Rand Co.* v. *McClendon*, 498 U.S. 133, 143 (1990). The provision originated in an amendment made by the Senate Committee on Labor and Public Welfare to S. 4 between January 4 and April 18, 1973. Compare S. 4, 93d Cong. § 610 (Apr. 18, 1973) (I *Legislative History* 389, 585) with S. 4, 93d Cong. (Jan. 4, 1973) (I *Legislative History* 93, 186-189). In its original form, the provision contained both an "antiretaliation clause" and a clause prohibiting conduct that had "the purpose of interfering with the attainment of any right to which such participant may become entitled" (the "attainment clause"):

> It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary [1] for exercising any right to which he is entitled under the provisions of the plan, this Act, or the Welfare and Pension Plans Disclosure Act, or [2] for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan, this Act, or the Welfare and Pension Plans Disclosure Act.

S. 4, § 610 (Apr. 18, 1973) (I *Legislative History* 585). This language survived with only minor revisions in the final version of ERISA. The principal change was the addition, sometime later in the legislative process, of a third clause aimed at protecting the integrity of ERISA "inquiries" and "proceedings." See 29 U.S.C. § 1140 ("It shall be unlawful for any person to discharge, fine, suspend, expel, or discriminate against any person because he has given information or has testified or is about to testify in any inquiry or proceeding relating to this chapter or the Welfare and Pension Plans Disclosure Act.").

Notably, the version of the Senate Bill in which the attainment clause made its first appearance covered only

"pension plans" and "profit-sharing-retirement plans" — benefits subject to mandatory vesting under the bill. See S. 4, §§ 3(9), (10), (14), (15), 201-202 (Apr. 18, 1973) (I *Legislative History* 490-491, 509-514). It did not cover welfare benefit plans. The relatively limited discussion of Section 510 in the committee reports and floor debates focused on the problem of employees being discharged just before their pension benefits vested. See, *e.g.*, statement of Senator Hartke, I *Legislative History* 1244 ("a vesting provision is no better than the protection employees have against improper discharge — including layoff — discipline or other discrimination that puts an employee out of a job before vesting is achieved, thereby defeating his pension claim").

The Senate Report accompanying S. 4 stated that the provision had been "added by the Committee in the face of evidence that in some plans a worker's pension rights or the expectations of those rights were interfered with by the use of economic sanctions," and that additional safeguards were needed even though "the instances of these occurrences are "relatively small in number." S. Rep. No. 93-127, at 35-36 (Apr. 18, 1973) (I *Legislative History* 621-22). A subsequent House Report expressed a similar expectation that the provision would apply only in limited circumstances. See H.R. Rep. No. 93-533, at 17 (Oct. 2, 1973) (II *Legislative History* 2364).

2. Prior to 1990, all of the work of loading and unloading containers and trailers between railcars and trucks at the Hobart yard was performed by employees of respondent SFTS, a wholly owned subsidiary of Santa Fe.[2/] In early 1990, Santa Fe subcontracted the work to an unrelated

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[2/] Because petitioners' complaint was dismissed for failure to state a valid claim, we recite the facts in the light most favorable to petitioners and accept the truth of their allegations solely for the purpose of this proceeding.



company, respondent In-Terminal. Although as a consequence the workers were furloughed by SFTS, many subsequently accepted new jobs with In-Terminal doing the same work at the same location. Pet. App. 28a (¶ 29). The new jobs with In-Terminal allegedly included "substantially lower ERISA-protected employment 'fringe' benefits" than what the workers had received from SFTS. Pet. App. 30a (¶ 38).

This action was commenced in the United States District Court for the Northern District of California on July 17, 1992. Pet. App. 20a-36a. The complaint included a claim for "interference with protected rights" under Section 510 of ERISA, 29 U.S.C. § 1140. Pet. App. 21a, 29a-30a.[3/] In support of that claim, petitioners alleged that Santa Fe, SFTS, and In-Terminal had "agreed and conspired to intentionally interfere with [petitioners'] employment relationship and legitimate expectancy of continued employment for the express purpose of depriving [petitioners] of most, if not all of the substantial, ERISA-protected 'fringe' benefits of their employment with SFTS." Pet. App. 30a (¶ 37).[4/] Petitioners identified three categories of benefits that respondents had supposedly conspired to interfere with: (1) benefits under the Railroad Retirement Act of 1974, 45 U.S.C. § 231 *et seq.*; (2) benefits provided through the Teamsters Union pension plan; and (3) benefits (including health insurance)

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[3/] The remaining two counts of petitioners' complaint advanced claims under the Federal Employers' Liability Act, 45 U.S.C. § 51 *et seq.* Pet. App. 30a-35a. Those claims are not before the Court. See U.S. Br. 8 n.7.

[4/] The complaint also named Santa Fe Pacific Corporation, the parent company of respondent Santa Fe, as a defendant. Pet. App. 20a, 23a (¶ 10), 30a. Santa Fe Pacific Corporation, however, was never served with the complaint and accordingly was not a party to the proceedings below. Br. in Opp. ii.

provided through the Teamsters Union health and welfare plans. Pet. App. 26a (¶ 19).

With regard to the first category of benefits, petitioners alleged that SFTS, as an employer covered by the Railroad Retirement Act, "made contributions" and paid "taxes" to the Railroad Retirement Board (RRB) of "approximately $6,300 per employee per year," an amount that "greatly exceeded that which non-railroad employers were required to make to the Social Security funds." Pet. App. 25a, 28a (¶¶ 17, 28). Petitioners further alleged that respondents had conspired to outsource the work performed by SFTS at the Hobart yard "for the express purpose of avoiding payments of monies for RRB benefits into the Railroad Retirement Fund." Pet. App. 29a (¶ 33). Indeed, according to the petitioners SFTS and Santa Fe management told them that this was "the reason" for awarding the contract to In-Terminal. Pet. App. 28a (¶¶ 28, 30); see also Pet. App. 38a. And, because In-Terminal was subsequently determined not to be covered by the Railroad Retirement Act, according to petitioners' allegations defendants succeeded in "completely avoid[ing]" these payments. Pet. App. 28a-30a.

The remaining two categories of benefits were provided under ERISA-qualified, multiemployer Teamsters Union plans to which SFTS made periodic contributions. Because In-Terminal's workforce was also represented by the Teamsters Union, former SFTS employees who were hired by In-Terminal continued to receive benefits under the Teamsters plans. See Pet. Br. 4; Pet. App. 28a (¶ 30). Nevertheless, as a consequence of the job change petitioners "suffered a reduction of contributions to and benefits from their pension plan and health and their welfare plan." Pet. App. 28a (¶ 30). Specifically, petitioners alleged that respondents' actions caused a reduction in their "benefits in the form of wages, health insurance, pension, vacation days, sick leave, and holiday pay." Pet. App. 29a (¶ 35); see also *id.* at 28a (¶ 30) (alleging that petitioners "lost vacation pay, their



hourly wage was reduced, holidays and sick leave time were cut, they lost * * * job security and had to go through a probationary period of 30 days"). Petitioners also stated that respondents' actions had impaired their "legitimate expectation of advancement and long-term continued employment." Pet. App. 29a (¶ 35). As with petitioners' claim of lost wages, however, those allegations did not encompass benefits provided by any ERISA plan.

The district court dismissed the entire complaint, including the Section 510 claim, for failure to state a claim upon which relief could be granted. Pet. App. 16a-17a.

3. The Ninth Circuit affirmed in part and reversed in part. Pet. App. 1a-15a. With regard to petitioners' Section 510 claim, the court of appeals examined each of the three categories of benefits separately. Petitioners' "claim of interference with benefits due them under the Railroad Retirement Act 1974," the Ninth Circuit concluded, did not state a valid claim under Section 510. Pet. App. 9a. The court reasoned that ERISA, by its terms, expressly excludes any "governmental plan" from coverage, and concluded that the exclusion covered any plan under the Railroad Retirement Act of 1974. Pet. App. 9a-12a.

As for petitioners' allegation of interference with benefits under the Teamsters pension plan, the Ninth Circuit held that it "clearly stated a claim under Section 510." Pet. App. 8a. Section 510, the court explained, "'protects plan participants from termination motivated by an employer's desire to prevent a pension from vesting.'" *Ibid.* (quoting *Ingersoll-Rand*, 498 U.S. at 143).

The court of appeals found petitioners' allegations of interference with benefits under the Teamsters health and welfare plans insufficient to state a claim under the attainment clause of Section 510. In support of that conclusion, the court first explained that under Ninth Circuit law, "section 510 'does not prohibit an employer from altering the

package of medical benefits that it provides its employees, but only from interfering with an employee's use of the benefits provided." Pet. App. 8a (quoting *DeVoll* v. *Burdick Painting, Inc.*, 35 F.3d 408, 411 (9th Cir. 1994)); see also *id.* at 8a n.6 (noting that "[o]ther circuits have reached a contrary conclusion" on this point). The court added that because "unlike pension benefits, welfare benefits do not vest, * * * employers remain free to unilaterally *amend* or *eliminate* such plans without considering employees' interests." *Id.* at 8a (internal quotations omitted; emphasis added by court of appeals). In addition, the court pointed out that under Ninth Circuit law, "no action lies under Section 510 for an employer's refusal to hire employees of its [corporate] predecessor because the employees insist upon maintenance of previous benefit levels." *Id.* at 9a. And finally, the court reasoned that the "existence of a present 'right' is a prerequisite to section 510 relief, and employees have no present 'right' to future, anticipated welfare benefits." *Ibid.*

This Court granted the petition to review only the court of appeals' affirmance of the dismissal of petitioners' Section 510 claim relating to health and welfare benefits.

## SUMMARY OF ARGUMENT

I. The issue in this case is whether petitioners' allegation that Santa Fe contracted out work previously performed by its subsidiary in order to reduce expenses attributable in part to the cost of welfare benefits states a claim under Section 510 of ERISA. Petitioners' and the government's arguments are far-reaching; if they are correct, employers would violate Section 510 whenever they closed a plant, subcontracted work, laid off employees or made similar operational changes with the intent to reduce benefit costs. Petitioners and their *amici* are correct in their argument that Section 510 applies to welfare benefits, and the court of appeals' decision should not be read to the contrary, but that does not resolve the issue of whether the court of



appeals was correct in holding that petitioners had failed to state a valid cause of action.

II. The plain language of the attainment clause of Section 510 precludes petitioners' expansive interpretation. Congress used "attain" and "attainment" throughout ERISA to refer to reaching the point of eligibility for benefits. Section 510 prohibits discharge or other discrimination intended to prevent pension benefits from vesting or otherwise to block employees from reaching eligibility status for benefits.

III. The legislative history of ERISA confirms that Congress intended Section 510 to play an important, but limited role, and not to interfere with operational changes even if they are intended to reduce benefit costs. The attainment clause first appeared in versions of the bill that applied only to retirement benefits that were subject to mandatory vesting rules. Congress was concerned that unscrupulous employers might discharge workers just before their pensions vested. Section 510 was intended to prevent that abuse. There is nothing in the legislative history to indicate that Congress intended to interfere with fundamental business decisions, or to require employers to ignore benefit costs in making those decisions.

IV. Applying a variety of rationales, several courts have recognized that Section 510 does not prohibit employers from taking benefit costs into account when they decide whether to contract out work, close a plant, or make other operational changes. ERISA undoubtedly permits employers to modify or eliminate welfare benefits; it makes no sense to say that employers are free to contract out work or make similar changes only if they first terminate their welfare plans. The attainment clause may be interpreted to prevent discharge of employees in order to prevent imminent benefit claims, but nothing like that was alleged in this case and that interpretation would not go so far as to preclude employers from taking benefit costs into account in making important

operational decisions. Congress could not possibly have intended Section 510 to cause the flood of litigation that would ensue from petitioners' interpretation, or to provide such a powerful disincentive to the creation of welfare benefit plans.

## ARGUMENT

### I. THE ISSUE IN THIS CASE IS WHETHER EMPLOYERS CAN CONSIDER THE COSTS OF EMPLOYEE BENEFITS WHEN THEY MAKE CRITICAL DECISIONS ABOUT THE STRUCTURE AND OPERATION OF THEIR BUSINESSES

Stripped of its hyperbole, the question presented in this case is whether an allegation that a company contracted out work previously done by a wholly-owned subsidiary in order to reduce labor costs attributable to health and welfare benefits states a claim under Section 510 of ERISA. According to the complaint, Santa Fe stopped using its subsidiary, SFTS, to do cargo-handling work at Hobart yard and instead contracted that work out to an unrelated company, In-Terminal. Pet. App. 24a-25a. The reason for the change was to reduce Santa Fe's cargo-handling expenses; SFTS's labor costs were higher than those at In-Terminal because SFTS (and not In-Terminal) was required to make contributions under the Railroad Retirement Act, and because SFTS was obligated to make higher contributions to the Teamsters Union pension and health and welfare funds than In-Terminal was required to make under its Teamsters contract. *Id.* at 7a, 26a, 28a-29a, 38a. The Ninth Circuit held that those allegations did not state a cause of action under Section 510, and it is that part of the court of appeals' holding that this Court agreed to review.

The same claim — if it is authorized under ERISA — could be raised in a variety of similar contexts. For example, if petitioners are correct an employer who decides to close one plant rather than another or to scale back operations at one plant rather than another would violate Section 510 if the higher costs at the affected plant were attributable to welfare benefits. Applying the approach advocated by petitioners, one district court held that allegations that an employer closed one plant rather than another because of higher benefit costs stated a cause of action under Section 510; the court reasoned that although it "is not always illegal" to terminate employees "in order to reduce labor costs," Section 510 would prohibit the terminations "if the primary reason for higher labor costs" is the costs of ERISA-covered benefits. *Nemeth* v. *Clark Equipment Co.*, 677 F. Supp. 899, 907 (W.D. Mich. 1987). The district court then shifted the burden to the employer to prove that it would have made the same decision without regard to benefit costs. *Id.* at 903, 905.[2/]

The government's brief makes the breadth of the issue in this case crystal clear:

> Whenever a decision to discharge a large group of employees — such as in connection with a plant closing or a decision to contract out work — is motivated by a desire to save money, the employer may usually be indifferent to whether its savings will result from lower benefit costs or other factors. In such a case, the employer *likely* would lack the requisite intent to support a Section 510 claim. Where, however, *there is evidence* that an employer has contracted out its work, and thus discharged its employees, for the specific purpose of escaping obligations to pay benefits, the intent requirement is met.

U.S. Br. 21-22 (citations omitted; emphasis added). See also Pet. Br. 28-29. So, under petitioners' and the government's reading of Section 510, an employer seeking to reduce costs

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[2/] The court ultimately determined that the employer had met its burden. 677 F. Supp. at 905, 909-910.

can close a plant or subcontract work *unless* it knows and intends that an important element of its cost savings will come from reduced benefit costs, in which case it violates ERISA. Should employers therefore make important structural decisions without analyzing the source of their cost problems? A more unrealistic proposition is hard to imagine. It is also hard to imagine a surer way to convert every cost-cutting operational change into a federal lawsuit in which the defendant will effectively have the difficult burden of proving that it did not act with the supposedly improper intent.[6/]

The effect of petitioners' and the government's reading of section 510 would be to require employers undertaking structural, cost-cutting measures such as plant closures, layoffs, or outsourcing of work to put their heads in the sand and ignore a very real component of their labor costs — the cost of employee benefits. The language of Section 510 does not support that result, and both the overall design of ERISA and the legislative history of Section 510 confirm that Congress had no such intention. To the contrary, Section 510 was carefully drafted to serve an important but limited purpose: to prohibit employers from discharging employees or taking other steps to prevent their pension rights from vesting or to prevent them from attaining

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[6/] The attainment clause applies not only in cases of discharge, but whenever "any person * * * discharge[s], fine[s], suspend[s], expel[s], discipline[s] or discriminate[s] against a participant or beneficiary." Yet as the government acknowledged in a previous case, ERISA "does not itself proscribe discrimination in the provision of [welfare] benefits." *Shaw*, 463 U.S. at 91. See U.S. Br. in *Greenberg* v. *H&H Music Co.*, No. 91-1283, cert. denied, 506 U.S. 981 (1992), at 15. If the government's current interpretation of the attainment clause is correct — so that any "discrimination" that would reduce or eliminate future welfare benefits would violate the clause — then "Section 510 would also result in the vesting of health care benefits — a result Congress clearly chose not to mandate under Part Two of ERISA." *Id.* at 16.



eligibility status for other benefits. Section 510 does not "have the effect of federalizing the law of employee discharge and discipline";[7/] it was not intended to require employers to close their eyes to benefit costs; and it was not intended to interfere with the right of companies to make fundamental business decisions.

We do not argue that Section 510 has no application whatsoever to health and welfare benefits or to other "nonvested" benefits, and we do not believe the court of appeals' decision need be read so broadly. The court's decision — which includes only one paragraph and one footnote on the issue — relies on the fact that welfare benefits do not vest, and that employers retain the right to modify or eliminate those benefits, but the court does not categorically assert that Section 510 can never apply in cases involving welfare benefits or other nonvested benefits. Pet. App. 8a-9a. To the contrary, the passage from *DeVoll* v. *Burdick Painting, Inc.*, quoted in the opinion below states that Section 510 prohibits "interfering with an employee's use of the [medical] benefits provided." 35 F.3d at 411; Pet. App. 8a.[8/] That hardly implies that Section 510 has no application at all to such benefits. Nor do the two other Ninth Circuit decisions cited by the court stand for the broad position that

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[7/] J. Langbein & B. Wolk, PENSION AND EMPLOYEE BENEFIT LAW 110 (1990).

[8/] By focusing on whether the benefits "vest," and on the "existence of a present 'right,'" while at the same time acknowledging that "interfering with an employee's use of the [medical] benefits provided" would violate Section 510 (Pet. App. 8a, 9a), perhaps the court of appeals meant that Section 510 applies only in situations akin to vesting, where participants are about to attain the right to claim a benefit. In any event, the court of appeals held that petitioners' allegations with regard to their health and welfare benefits did not state a cause of action under Section 510, and it is that holding we urge the Court to affirm.

Section 510 never applies to health and welfare benefits. *Joanou* v. *Coca-Cola Co.*, 26 F.3d 96, 98 (9th Cir. 1994); *West* v. *Greyhound Corp.*, 813 F.2d 951, 954 (9th Cir. 1987). The government is therefore mistaken in its suggestion (U.S. Br. 9, 11) that "the court of appeals concluded that no claim lies under Section 510 for interference with attainment of rights to welfare benefits" and that "[t]he court of appeals [held] that Section 510 of ERISA is categorically inapplicable to claims of interference with the attainment of rights under an employee welfare benefit plan."

## II. SECTION 510 DOES NOT SUPPORT A CAUSE OF ACTION AGAINST AN EMPLOYER THAT CONTRACTS OUT WORK TO REDUCE WELFARE BENEFIT COSTS

Section 510 makes it "unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary * * * for the purpose of *interfering with the attainment* of any right to which such participant may become entitled under the plan, this subchapter, or the Welfare and Pension Plans Disclosure Act." 29 U.S.C. § 1140 (emphasis added). We agree with petitioners (Br. 12-13) that the Court should give effect to the plain meaning of that language.[9] To attain means "[t]o reach or

[9] In other contexts, the Court has relied on the law of trusts in interpreting ERISA's provisions. See, *e.g.*, *Varity Corp.* v. *Howe*, 116 S. Ct. 1065, 1070 (1996). Section 510 is not based in trust law, however, and to our knowledge there is no useful analogy in the law of trusts. See G. Bogert & G. Bogert, THE LAW OF TRUSTS AND TRUSTEES §§ 861-871 (rev. 2d ed. 1995); RESTATEMENT (SECOND) OF TRUSTS §§ 197-226A (1959). Petitioners suggest that Section 510 was patterned after the National Labor Relations Act and that, accordingly, cases decided under that statute are relevant here. Pet. Br. 9-10, 33-36 & n.15. That argument is only half correct. The legislative materials indicate that Congress may have relied on Section 8(a) of the NLRA, 29 U.S.C. § 158(a)(3), as a model for the list of adverse actions —



come to by progression or motion; to arrive at; as, to attain a ripe old age." BLACK'S LAW DICTIONARY 126 (6th ed. 1990). See also WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 140 (1971), which defines "attain" as "reach, gain, achieve [or] accomplish." By the ordinary meaning of the plain language, and as intended by Congress, "interfering with the attainment of any right to which [a] participant may become entitled" means preventing a participant from reaching eligibility for benefits, and not — as petitioners and the government would have it — the far broader notion of "interfer[ing] with a participant's future entitlement to benefits" (U.S. Br. 15) or right "to make claims." Pet. Br. 18.

The words "attain" and "attainment" are used frequently in ERISA and in the related sections of the Internal Revenue Code, and are always used to refer to reaching a particular age or threshold of eligibility for a benefit. To give a few examples. the Internal Revenue Code's vesting requirement for ERISA pension plans provides that "[a] trust shall not constitute a qualified trust * * * unless the plan of which such trust is a part provides that an employee's right to his normal retirement benefit is nonforfeitable upon the attainment of normal retirement age." 26 U.S.C. § 411(a). Similarly, Section 203 of ERISA requires that "[e]ach pension plan shall provide that an employee's right to his normal retirement benefit is nonforfeitable upon the attainment of normal retirement age." 29 U.S.C. § 1053. A defined benefit plan does not satisfy the accrual requirements of Section 204 of ERISA "if, under the plan, an employee's

"discharge, fine, suspend, expel, discipline or discriminate" — that would trigger liability under Section 510. See II *Legislative History* 1774-1775 (remarks of Sen. Hartke). But Section 8(a) contains no analogue of ERISA's "attainment of rights" language, and the cases interpreting the NLRA are of no assistance in this regard.

benefit accrual is ceased, or the rate of an employee's benefit accrual is reduced, because of the attainment of any age." 29 U.S.C. § 1054(b)(1)(H)(i). In each of these examples — and in all other provisions where the term is used in ERISA[10] — Congress used attainment to mean *reaching* a particular age or *arriving at* eligibility status for a benefit.

"Attainment" carries the same meaning in Section 510. By prohibiting conduct that has "the purpose of interfering with the attainment of any right to which [a] participant may become entitled under the plan," Section 510 prohibits conduct intended to block participants from reaching eligibility status for benefits. The paradigmatic offense — the one Section 510 was drafted to address — is discharging employees just before their pension benefits become vested in order to avoid pension liability. Similarly, if an employee benefit plan provided that employees become eligible for medical coverage after one year of employment, it would violate Section 510 to fire employees just before they reach that threshold of eligibility in order to avoid the expense of that benefit. But the attainment clause does not carry the much broader and more questionable meaning advanced by petitioners; it does not prohibit employers from taking benefit

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[10] See 26 U.S.C. §§ 72, 162, 401, 402, 403, 408, 409, 410, 414, 415, 417; 29 U.S.C. §§ 1002(24), 1052, 1055, 1056 (all using "attain" or "attainment" to refer to reaching a particular age or the age of eligibility for a benefit). Congress uses the term the same way in other retirement statutes. See, *e.g.*, 22 U.S.C. § 4049(f) (under the Foreign Service Retirement and Disability Act, a supplemental survivor annuity may be paid if the annuitant had "sufficient recall service to attain eligibility for a supplemental annuity"); 45 U.S.C. § 231e(c)(1) (Railroad Retirement Act provision dealing with benefits that may be available "upon attaining the age of eligibility"). This Court has used "attainment" in the same sense; see, *e.g.*, *Califano* v. *Webster*, 430 U.S. 313, 318 (1977) (computation required under the Social Security Act "turned on the attainment of 'retirement age'").



costs into account in making fundamental decisions about the scope and operation of their businesses, and it does not effectively vest health and welfare benefits (a step Congress deliberately declined to take) by giving participants a federal cause of action whenever employers undertake cost-cutting measures that result in the reduction or loss of benefits.

Petitioners did not allege that they were discharged just before they became eligible for any particular benefit in order to prevent them from attaining eligibility. Instead, they alleged that when they were hired by In-Terminal to do the work they had previously done as SFTS employees, "they suffered a reduction of contributions to and benefits from their * * * health and their welfare plan." Complaint ¶ 30, Pet. App. 28a. Petitioners' claim, as they assert in their brief (at 29) is that "Respondents conspired to discharge them to avoid paying health and welfare * * * benefits at the higher level." Those allegations — that respondents "conspired" to contract out to In-Terminal the work previously done by SFTS in order to reduce the cost of welfare benefits — do not state a claim under Section 510.

## III. ERISA'S LEGISLATIVE HISTORY DEMONSTRATES THAT CONGRESS DID NOT INTEND SECTION 510 TO APPLY TO THE ALLEGATIONS RAISED BY PETITIONERS

Because the language of Section 510 plainly demonstrates that petitioners have failed to state a valid claim, there seems little need to consult the legislative history. If the Court concludes, however, that Section 510's meaning is ambiguous, any ambiguity would be dispelled by the provision's origins and legislative history. The legislative history shows beyond any doubt that Congress intended the attainment clause of Section 510 to prohibit employers from discharging or otherwise discriminating against workers to prevent their retirement benefits from vesting. Although the language of the provision is broad enough also to apply to welfare benefits, there is no evidence that the clause was intended to

interfere with fundamental business decisions or to require employers to pretend that benefit costs do not exist when they make such decisions.

1. *Origins And Initial Consideration in the Senate.* Section 510 originated in an amendment made to S. 4 by the Senate Committee on Labor and Public Welfare between January 4, 1973, when the bill was introduced by Senator Williams and forty co-sponsors and referred to the Committee, and April 18, 1973, when it was reported out of the Committee. Compare S. 4, 93d Cong. § 610 (Apr. 18, 1973) (I *Legislative History* 389, 585) with S. 4, 93d Cong. (Jan. 4, 1973) (I *Legislative History* 93, 186-189).[11/] In its original form, the provision was virtually identical to the first sentence of Section 510 as ultimately enacted (the sentence at issue in this case):

> It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of the plan, this Act, or the Welfare and Pension Plans Disclosure Act, or for the purpose of interfering with the attainment of any right to which such participant may become entitled

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[11/] On January 3, 1973, a similar bill was introduced in the House by Representatives Dent and Perkins and referred to the Committee on Education and Labor. H.R. 2, 93d Cong. (Jan. 3, 1973) (I *Legislative History* 1, 3). It contained no provision like Section 510. Nor was such a provision included in H.R. 9824, which Representative Dent introduced as an alternative to H.R. 2 on August 2, 1973 (and which was also referred to the Committee on Education and Labor). See H.R. 9824, 93d Cong. (Aug. 2, 1973) (I *Legislative History* 685-686). The first appearance of a precursor to Section 510 in a House bill was on October 2, 1973, when H.R. 2, as amended, was reported out of the Committee on Labor and Education. See H.R. 2, 93d Cong. § 510 (Oct. 2, 1973) (II *Legislative History* 2181, 2341).



> under the plan, this Act, or the Welfare and Pension Plans Disclosure Act.

S. 4, 93d Cong. § 610 (Apr. 18, 1973) (I *Legislative History* 585).[12/]

Significantly, as reported out of the Senate Committee on Labor and Public Welfare, the Senate bill did not cover "employee welfare benefit plans" as that term would later come to be broadly defined in ERISA. Instead, it covered only two types of plans, both of which focused on providing retirement benefits: "pension plans" and "profit-sharing-retirement plans." See S. 4, 93d Cong. § 3(9), (10), (14), (15) (Apr. 18, 1973) (I *Legislative History* 490-491). Under the bill, both "pension plans" and "profit-sharing-retirement plans" were subject to mandatory vesting requirements. See *id.* §§ 201, 202 (I *Legislative History* 509-514). Thus, when the attainment clause was drafted, its intent could only have been to protect benefits that were subject to vesting.

Congress did not view the precursor of Section 510 as establishing far-reaching new rights or as a broad remedial provision that would be called into play whenever an employer made cost-cutting decisions that resulted in job loss. As the Senate Report accompanying S. 4 put it, the provision was "added by the Committee in the face of evidence that in some plans a worker's pension rights or the expectation of those rights were interfered with by the use of economic sanctions." S. Rep. No. 93-127, at 36 (Apr. 18,

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[12/] The principal subsequent change made to the provision was the addition of a second sentence aimed at protecting the integrity of ERISA inquiries and proceedings. See 29 U.S.C. § 1140 ("It shall be unlawful for any person to discharge, fine, suspend, expel, or discriminate against any person because he has given information or has testified or is about to testify in any inquiry or proceeding relating to this chapter or the Welfare and Pension Plans Disclosure Act.").

1973) (I *Legislative History* 622). The Senate Report observed that "the instances of these occurrences are relatively small in number." *Ibid.*

On August 21, 1973, the Senate Committee on Finance reported out S. 1179 as an alternative to S. 4. See S. 1179, 93d Cong. (Aug. 21, 1973) (I *Legislative History* 780). The bill contained no provision similar to Section 510. On September 17, 1973, Senators Nelson, Long, Bentsen and Bennett introduced Amendment 496 as a substitute for S. 4 and a compromise between S. 4 and S. 1179. Amendment No. 496, 93d Cong. (Sept. 17, 1973) (I *Legislative History* 1271). Amendment 496 contained a provision — denominated Section 699A but otherwise untitled — that contained noninterference and attainment clauses that were identical to those added by the Senate Committee on Labor and Public Welfare to S. 4. *Id.* § 699A (I *Legislative History* 1496). Section 699A also included, for the first time, a third clause aimed at protecting the integrity of ERISA "inquir[ies]" and "proceeding[s]." *Ibid.*

The Senate debate over S. 4, S. 1179, and Amendment 496, further confirms that the attainment clause was intended to serve the limited purpose of preventing employers from defeating the vesting requirements of the bill. For example, during the debate on September 18, 1973, Senator Hartke, critical of the absence of vesting requirements before 30 years of age, asked: "Is there not a direct, positive incentive for every employer to fire a person when he reaches 29 years and 364 days of age?" See II *Legislative History* 1640. Senator Javits responded by identifying Section 699A of Amendment 496 as a provision that he and Senator Williams had added in order to address that very situation. *Id.* at 1641.

On September 19, 1973, in discussing the legislation, Senator Hartke noted that the measure was aimed, among other things, at remedying the fact that "nonunion employees, especially white-collar and management people can now



be fired with impunity to *defeat their pension eligibility*." II *Legislative History* 1758 (emphasis added). Somewhat later, Senator Hartke had this to say about the purpose of the attainment clause:

> No vesting formula will produce real employee protection so long as employers are free to fire employees *to defeat pension eligibility*. Unfortunately, the Senat[e] Labor Committee studies document many such occurrences. No statutory protection now exists to prevent such action. * * * Especially vulnerable are managers and executives whose *substantial pension potentialities* provide an incentive to their *discharge before vesting*.

II *Legislative History* 1774 (emphasis added). As Senator Hartke's comments suggest, the attainment clause was aimed at securing pension rights and was inextricably linked to the vesting requirements.

Later in the debate on September 19, 1973, Senator Pastore asked about what protections would be afforded to those not yet covered by the new law, and whether there might not be a perverse incentive on employers' part to discharge those workers just short of vesting. II *Legislative History* 1808. Senator Javits responded: "[T]here is a provision in the bill that deals with the point the Senator from Rhode Island raised. It is section 669(A) * * * which provides that, once the bill is passed, an employer cannot fire anybody with impunity to *avoid pension responsibility*." *Id.* at 1811 (emphasis added). Accord II *Legislative History* 1871-1872 (Sept. 19, 1973) (remarks of Sen. Kennedy) ("There is yet another problem that we discovered during the lengthy hearings on this subject. Many of the plans established long years of service before the worker is entitled to any pension benefits. Then, all too often when the worker is approaching the time when his pension rights will be secured, he finds himself the victim of an abrupt termination.").

Also illustrative of the limited scope of the attainment clause is the debate over an amendment to S. 4 proposed by Senator Hartke. On September 13, 1973, Senator Hartke had introduced an amendment that would have added an informal administrative procedure for enforcing the attainment clause and other rights of plan participants. I *Legislative History* 1244 (remarks of Sen. Hartke); see also Amendment No. 482, 93d Cong. (Sept. 13, 1973) (I *Legislative History* 1245-1247). He explained:

> The key to effective pension reform is early vesting, but *a vesting provision is no better than the protection employees have against improper discharge* — including layoff — discipline or other discrimination that puts an employee *out of a job before vesting is achieved, thereby defeating his pension claim.*

I *Legislative History* 1244 (emphasis added); accord II *Legislative History* 1836 (remarks of Sen. Hartke) (Sept. 19, 1973). Opponents criticized the amendment as creating a new administrative bureaucracy, and it was defeated. II *Legislative History* 1838-1839.

The legislation's provisions included changes to the tax laws; therefore to accommodate the constitutional requirement that revenue bills originate in the House, Senator Long moved that the Senate's action on S. 4 be added as an amendment to H.R. 4200, a House-passed bill relating to the tax treatment of servicemen and former servicemen. II *Legislative History* 1879-1880. That motion was carried and, on September 19, 1973, the Senate unanimously voted to pass H.R. 4200 as amended. II *Legislative History* 1879-1883. H.R. 4200 carried forward the attainment clause as part of Section 699A of Amendment 496. H.R. 4200, 93d Cong. § 699A (Sept. 19, 1973) (II *Legislative History* 2105-2106).

2. *Consideration and Initial Action in the House.* Several pension bills were introduced in the House of Repre-



sentatives and referred to the Committee on Education and Labor during the time in which the Senate was considering the legislation. Those early House bills, however, contained no provision resembling Section 510. See H.R. 2, 93d Cong. (Jan. 3, 1973) (I *Legislative History* 3-65); H.R. 9824, 93d Cong. (Aug. 2, 1973) (I *Legislative History* 685-686, 776-777).

Following the Senate's enactment of H.R. 4200, the House Committee on Labor and Education, on October 2, 1973, reported out an amended version of one of those bills, H.R. 2, which for the first time included the language that eventually became Section 510, in a form that was essentially identical to that contained in S. 4 as reported out of the Senate Committee on Labor and Public Welfare. H.R. 2, 93d Cong. § 510 (Oct. 2, 1973) (II *Legislative History* 2181, 2341).[13] Unlike every version of the pension reform legislation that had been considered by the Senate, H.R. 2 included the broad definition of "employee welfare benefit plan" that would later be included in ERISA. H.R. 2, 93d Cong. § 3(1) (Oct. 2, 1973) (II *Legislative History* 2246).

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[13] That provision read:

> Interference with Rights Protected Under Act. It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of the plan or this Act, or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan, or this Act. The provisions of section 503 shall be applicable in the enforcement of this section.

H.R. 2, 93d Cong. § 510 (Oct. 2, 1973) (II *Legislative History* 2181, 2341).

While H.R. 2 was awaiting floor action, the House Labor Committee reported out another pension reform bill, H.R. 12906. H.R. 12906, 93d Cong. (Feb. 20, 1974) (II *Legislative History* 2761); see II *Legislative History* 2760 (remarks of Rep. Dent) (Feb. 20, 1974). H.R. 12906 contained an attainment clause that was identical in all material respects to the provision in H.R. 2. See H.R. 12906, 93d Cong. § 510 (Feb. 20, 1974) (II *Legislative History* 2916-2918). On February 26, 1974, the House consolidated H.R. 12906 with H.R. 12855, a bill reported out of the Ways and Means Committee, into a new H.R. 2. See II *Legislative History* 3351-3352, 3366. This new version of H.R. 2 contained the same attainment clause as was included in H.R. 12906. H.R. 2, 93d Cong. § 510 (Mar. 6, 1974) (III *Legislative History* 3898, 4053-4054). On February 28, 1974, after several days of debate, the House passed H.R. 2 by a vote of 376 to 4. III *Legislative History* 3593-3596.[14]

3. *Conference Committee's Work and Final Passage.* A conference committee was convened to resolve differences in the bills. Not surprisingly, the committee retained the attainment clause (and the rest of Section 510) which had been a part of both bills. H.R. Conf. Rep. No. 93-1280 at 80 (Aug. 12, 1974) (III *Legislative History* 4277, 4355). Explaining the results of the conference, the House Conference Report simply paraphrased the statutory text, stating that both versions of the bill made it "unlawful to interfere

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[14] The House debates on H.R. 2 demonstrate that the concerns underlying the attainment clause had not changed. See II *Legislative History* 3413 (Feb. 26, 1974) (remarks of Rep. Ullman) (identifying among numerous problem areas the legislation was intended to address the fact that "[e]xtreme cases have been noted in which employees have lost retirement rights at advanced ages as a result of being discharged shortly before they would be eligible to retire").



with the attainment of any rights to which a participant or beneficiary may become entitled." *Id.* at 330 (III *Legislative History* 4597).

The Senate debate on the Conference bill provides further evidence that legislators understood the limited role of the attainment clause. In introducing the Conference Report, Senator Williams stated that the legislation contains "[a] further protection for employees" insofar as it prohibits "discharge, or other discriminatory conduct toward participants and beneficiaries which is designed to interfere with the attainment of vested benefits or other rights under the bill." III *Legislative History* 4745 (Aug. 22, 1974). Shortly thereafter, Senator Javits listed fourteen basic rights created by the legislation. III *Legislative History* 4751 (Aug. 22, 1974). The final right listed by Senator Javits was "Protection of Pension Rights Against Employer or Union Interference":

> Every employee is to have the right, enforceable by the Secretary of Labor, to be free from interference with his pension benefits. This means that he cannot be discharged, fined, suspended, expelled or otherwise interfered with in order to prevent him from receiving pension benefits or attaining eligibility for pension benefits.

III *Legislative History* 4753 (emphasis added).

In view of the foregoing evidence, one can only marvel at the government's sweeping assertion that "[t]here is * * * nothing in the legislative history that suggests that Section 510 prohibits only interference with the attainment of pension benefits, or benefits subject to vesting." U.S. Br. 13 n.10. Accord Pet. Br. 19 (asserting that "nowhere in the legislative history did Congress indicate that it desired to limit the remedial scope of § 510 to interferences with the right to receive or attain pension benefits that will vest at some date"). In fact, the copious legislative materials described above *all* suggest that this was precisely Congress's purpose

in enacting Section 510. Although we agree that the plain language of Section 510 would apply in cases where an employer takes action to prevent a participant from becoming eligible for welfare benefits, there is no indication in the legislative materials that Congress intended to create liability in a case like this.

To the contrary, the legislative history makes it plain that the attainment clause was intended to prohibit employer action aimed at blocking particular employees or groups of employees from "vesting" or otherwise becoming eligible for guaranteed benefits. As we discuss later, there may be difficult situations in which application of Section 510 is in doubt; the government gives as examples an employer who terminates an employee who needs surgery in order to avoid that expense, or discharges a terminally ill patient to prevent his family from collecting a death benefit. U.S. Br. 15-16. But this case does not involve one of those difficult situations. Petitioners claim that Santa Fe subcontracted the work previously done by SFTS in order to reduce welfare benefit costs, among other things,[15/] and that is far removed from the situation Congress had in mind when it drafted Section 510.

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[15/] Even if the cost of welfare benefits were the sole motivating factor in an employer's decision to close a plant, subcontract work, or take similar action, Section 510 would not prohibit the decision. But petitioners' claim was *not* that elimination of welfare costs was the dominant motivation for Santa Fe's decision. Instead, they claimed that Santa Fe acted to reduce labor costs more generally, including ERISA-covered benefits and, most significantly, contributions required under the Railroad Retirement Act. Pet. App. 7a, 29a-30a, 38a; Pet. Br. 4-5, 6-7.



## IV. SECTION 510 PROHIBITS DISCHARGES AND OTHER DISCRIMINATION INTENDED TO PREVENT EMPLOYEES FROM BECOMING ELIGIBLE FOR BENEFITS, BUT IT DOES NOT PROHIBIT SUBCONTRACTING, PLANT CLOSURES OR OTHER FUNDAMENTAL BUSINESS DECISIONS INTENDED TO REDUCE BENEFIT COSTS

As the legislative history demonstrates, and as several courts of appeals have held, Congress did not intend Section 510 to prohibit employers from subcontracting work, closing facilities, or making other operational changes motivated by a desire to reduce benefit costs. Whether the focus is on the concept of attainment, or the meaning of the terms "discharge" and "discrimination," Section 510 should not be read to interfere with fundamental business decisions or to require employers to ignore the very real costs of benefits.

1. Several courts have recognized the limited role of the attainment clause of Section 510; their somewhat varied rationales do not diminish their common conclusion that Section 510 was not intended to interfere with fundamental management decisions even when motivated by benefit costs. For example, in *Phillips* v. *Amoco Oil Co.*, 799 F.2d 1464 (1986), the Eleventh Circuit examined Amoco's decision to discontinue retailing propane in Alabama and to sell that part of its business to another company. A group of former employees who lost their jobs as a result of the decision sued, claiming, *inter alia,* that Amoco's decision was motivated by a desire to interfere with plaintiffs' attainment of non-vested retirement benefits. 614 F. Supp. 694, 723 (N.D. Ala. 1985). Affirming the district court's award of summary judgment in favor of Amoco, the court of appeals held that the attainment clause "simply does not prohibit the sale of a going business." 799 F.2d at 1471.

The First Circuit reached a similar conclusion in *Aronson* v. *Servus Rubber Division*, 730 F.2d 12 (1984). Servus closed its plant in Chicopee, Massachusetts, began

laying off plant employees, and terminated the Chicopee employees' participation in its profit sharing plan as of the date it announced the plant closing. 730 F.2d at 13-14. Plaintiffs (who had not yet been laid off when the company terminated the plan) claimed that the company's actions were intended to interfere with their continued attainment of benefits. The court of appeals rejected their Section 510 claim, noting that closing the plant and terminating the employees' participation in the profit sharing plan constituted a "partial termination" under ERISA, the consequences of which are set by the statute (26 U.S.C. § 411(d)(3)).[16/] 730 F.2d at 16. Congress could not have intended Section 510 to prohibit the very conduct that the statute regulates elsewhere. *Ibid.*

The District of Columbia Circuit considered a Section 510 claim in *Andes* v. *Ford Motor Co.*, 70 F.3d 1332 (1995), a case with striking similarities to this one. Ford sold its Dealer Computer Services (DCS) subsidiary and terminated the DCS employees. Although the employees subsequently went to work for the purchaser, they no longer received some of the benefits they had been entitled to as Ford employees. A group of former DCS employees sued, claiming among other things that the sale was motivated in significant part by Ford's desire to reduce benefit costs and thus violated the attainment clause of Section 510. The court of appeals flatly rejected that claim, reasoning that "a corporate organizational change, such as a decision to sell a subsidiary" did not fit within Section 510 (70 F.3d at 1336-1337); indeed, the court held the termination of employees as a result of such a corporate change should not be regarded

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[16/] See also ERISA Section 4043(c)(4), 29 U.S.C. § 1343(c)(4), requiring reporting of partial terminations. The primary consequence of a partial termination is that the accrued pension benefits of all affected employees become nonforfeitable (*i.e.*, vested). 26 U.S.C. § 411(d)(3).



as a "discharge" within the meaning of Section 510. *Id.* at 1337-1338.[17/]

Another example, *Kross* v. *Western Electric Co.*, 534 F. Supp. 251 (N.D. Ill. 1982), was a class action on behalf of employees who had lost their jobs as part of a large reduction in the work force. *Id.* at 252. Plaintiffs claimed that the terminations were intended in significant part to avoid continued payment for health and welfare benefits in violation of Section 510, but the district court rejected that claim:

> The allegation that Western Electric terminated Kross and the other class members to avoid paying further fringe benefits does not state a claim under Section 510. The gist of an action under this section is to prevent retaliation against a plan participant or beneficiary for exercising rights under the plan or to prevent interference with the attainment of any rights to which he or she may become entitled. Kross has not alleged any facts constituting retaliation, and as he was already a participant in the insurance plans, he was not prevented from attaining rights under the plan.

*Id.* at 254 (citations omitted). The court of appeals reversed, 701 F.2d 1238 (7th Cir. 1983), but the district court's

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[17/] Contrary to the government's assertion (U.S. Br. 23 n.15), the D.C. Circuit's conclusion in *Andes* that "corporate organizational change[s]" should not be regarded as "discharges" within the meaning of Section 510 does not involve a separate question. Indeed, it is part and parcel of the central issue the Ninth Circuit decided[17/] in this case: whether Section 510 prohibits subcontracting work in order to reduce expenses attributable in part to welfare benefit costs. The D.C. Circuit's analysis of the concept of "discharge" is but another way of saying that Section 510 was intended to address conduct aimed at preventing individual employees or particular groups of employees from becoming eligible for benefits, and not to interfere with "corporate organizational change[s]" or other fundamental business decisions.

analysis of Section 510 was correct. See also *Blaw Knox Retirement Income Plan* v. *White Consolidated Industries, Inc.*, 998 F.2d 1185, 1191 (3d Cir. 1993) ("the sale of an ongoing business is not prohibited by section 510").[18]

These courts all recognized that Section 510 does not require employers to ignore benefit costs — as if they could really do so if they wanted to — and that it certainly does not interfere with companies' rights to consider all relevant costs in deciding whether to close plants, subcontract work, or make similar operational changes. Petitioners and the government can point to nothing in the language of the statute or its legislative history that supports their expansive interpretation of Section 510. Instead, they ignore the ordinary and intended meaning of "attainment," and equate "interfering with the attainment of any right to which [a] participant may become entitled" with much broader concepts, such as "interference with a participant's future entitlement to welfare benefits" (U.S. Br. 15), and interfering with "a future right * * * to make claims under [benefit] plans." Pet. Br. 18. Absent some evidence that Congress in this one instance intended to use the unusual and precise term "attainment" to mean something much broader — something that could easily have been put in plain language

[18] *Sutton* v. *Weirton Steel Division*, 724 F.2d 406 (4th Cir. 1983), also lends support to the Ninth Circuit's decision even though it was not a Section 510 case. The plaintiffs claimed that the "sole motivation" for the sale of Weirton Steel to a new, employee-owned company was "avoiding future pension obligations" and that it was therefore a violation of ERISA's fiduciary duty provisions. *Id.* at 410. The court of appeals rejected those claims. If petitioners' and the government's arguments in this case were correct, the Weirton Steel sale would have violated Section 510.



had Congress wanted to do so[19] — and that it intended to interfere with fundamental decisions about the scope and direction of business operations, there is no justification for expanding the language of this carefully and technically crafted statute. *Mertens* v. *Hewitt Assocs.*, 508 U.S. 248, 255 (1993); *Mead Corp.* v. *Tilley*, 490 U.S. 714, 723 (1989).

Petitioners (Br. 11, 21, 32) and the government (U.S. Br. 12-14, 18-21) place considerable reliance on *Heath* v. *Varity Corp.*, 71 F.3d 256 (7th Cir. 1995), and *Dister* v. *Continental Group, Inc.*, 859 F.2d 1108 (2d Cir. 1988), but neither of those cases are analogous to this one. *Dister* — which affirmed summary judgment in favor of the employer — involved an employee who claimed that in order to deprive him of enhanced pension benefits, his employer terminated him just four months before he was to become eligible for those benefits. 859 F.2d at 1109. Similarly, the plaintiff in *Heath* alleged that in order to prevent him from becoming eligible for early retirement benefits, he was fired shortly before his eligibility date. 71 F.3d at 257. In both of these cases, the plaintiffs thus alleged that they were discharged just before they became eligible for certain benefits — just before they crossed the eligibility threshold — in order to prevent them from attaining eligibility status for those benefits. Holding that those allegations of individually-targeted terminations intended to prevent the "vesting" (or its functional equivalent) of additional benefits properly state causes of action under Section 510 hardly means that employers are also prohibited from subcontracting out work or closing operations in order to reduce benefit costs.

[19] For example, Congress could have enacted a section of ERISA providing that "It shall be unlawful for any person to discharge, suspend, expel or discriminate against any participant in order to reduce or eliminate any costs or obligations under an employee benefit plan."

2. In holding that petitioners had not stated a claim under Section 510, the court of appeals emphasized that "welfare benefits do not vest" and "employers 'remain free to unilaterally amend or eliminate such plans without considering the employees' interests.'" Pet. App. 8a. See also *Curtiss-Wright*, 115 S. Ct. at 1228. As we explained earlier, we do not argue that Section 510 does not apply at all to welfare benefits. But there is little logic in petitioners' and the government's position that even though an employer is permitted to eliminate welfare benefits, it should not be permitted to close an operation or subcontract work if it is motivated in significant part by the cost of welfare benefits. Pet. Br. 20-21 & n.8; U.S. Br. 17-21 & n.13. Would an employer avoid liability if it terminated its welfare plans just before subcontracting the work? Judge Easterbrook's observation in *Heath* v. *Varity Corp.* may well be correct: the fact that an employer can amend or eliminate a welfare plan (or, generally, can terminate a pension plan; see ERISA Section 4041(b), 29 U.S.C. § 1341(b)) does not mean that it can discharge an employee to prevent him from reaching benefit eligibility status (*i.e.*, "for the purpose of interfering with [his] attainment of any right") under a plan that continues to exist.[20/] But that does not warrant an expansion of

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[20/] An alternative interpretation — one that the government embraced in *Greenberg* v. *H&H Music Co.*, No. 91-1283, cert. denied, 506 U.S. 981 (1992) — is that the word "right" in the attainment clause "does not refer to 'any right to which an employee may conceivably become entitled,' but to 'any right to which an employee may become entitled pursuant to an *existing enforceable obligation* assumed by the employer.'" U.S. *H&H Music* Br. 15 (emphasis added) (quoting the court of appeals opinion in that case). Under that view, whenever an employer retains the right to amend or terminate welfare benefit plans, "an employee has no 'right' protected by [the attainment] clause of Section 510 to prevent plan amendments made for the purpose of altering existing coverage to save costs." *Id.* at 16. If, as the



Section 510 beyond its intended scope, and it does not make it sensible to require an employer to first eliminate its benefit programs before closing a plant or subcontracting work.

3. The government argues (U.S. Br. 15-16) that if its expansive interpretation of Section 510 is not adopted, "an employer could, consistent with Section 510, discharge an employee who it knew needed surgery, for the purpose of preventing the employee from making a claim for surgical coverage under a health benefits plan — or could discharge a terminally ill employee in order to prevent him from attaining a death benefit." Of course, nothing like that is involved in this case, and the Court need not consider the application of Section 510 to those situations.[21/] In addi-

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government claimed, there is no "right" to future welfare benefits within the meaning of Section 510, then in this case, as in *H&H Music*, the plaintiffs failed to state a valid cause of action.

[21/] To a large extent, the parade of horribles that the government claims would occur if employers were permitted to discharge particular workers because they are ill or are likely to become ill (U.S. Br. 15-16) — and there are no allegations of that sort in this case — is eliminated by the continuation of health coverage requirements of the Consolidated Omnibus Budget Reconciliation Act of 1985 ("COBRA"), ERISA Section 601 *et seq.*, 29 U.S.C. § 1161 *et seq.* Under COBRA, terminated employees can elect to continue health care coverage at the group premium rate for up to eighteen months. But adoption of petitioners' and the government's position would compel employers to amend or terminate their health and welfare plans *before* closing a plant or subcontracting work, and that could defeat COBRA rights and hurt both the discharged employees and any continuing employees. Under COBRA, terminated employees are entitled only to whatever coverage is provided to continuing employees, and their coverage ends on "[t]he date on which the employer ceases to provide any group health plan to any employee." ERISA Sections 602(1) and 602(2)(B); 29 U.S.C. §§ 1162(1) and 1162(2)(B). Termination of

tion, as the government pointed out when it correctly recognized the limited role of Section 510 in the brief it submitted in *Greenberg* v. *H&H Music Co.*, No. 91-1283, cert. denied, 506 U.S. 981 (1992), other statutes, such as the Americans With Disabilities Act and the Rehabilitation Act of 1973, may prohibit such conduct. U.S. *H&H Music* Br. 17-18.[22/]

In any event, an argument can be made that discharging a terminally ill employee just before he becomes eligible for a death benefit with the intent to deprive him of that benefit may violate the attainment clause of Section 510, as might terminating an employee who is just about to become eligible for surgical benefits, in order to prevent him from collecting that benefit. The attainment clause, as we have explained,

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the health plan would terminate COBRA rights.

[22/] As notes 6 & 20, *infra*, make clear, the government's position in this case is flatly inconsistent with much of the position it took in *H&H Music*. In that case, the government asserted (U.S. Br. at 11 n.7) that "Section 510 is applicable to plan amendments made for purposes prohibited by that Section." But if amending a plan "for purposes prohibited by [Section 510]" is unlawful, and — as the government now claims — one of the purposes prohibited by Section 510 is to reduce benefit costs, *every* plan amendment that reduces or eliminates welfare benefits in order to reduce costs would violate Section 510. The government acknowledges (U.S. Br. 17-21) that ERISA permits employers to eliminate or curtail welfare benefits. See Section 402(b)(3) of ERISA, 29 U.S.C. § 1102(b)(3). Indeed, employers are "generally free under ERISA, for any reason at any time, to adopt, modify, or terminate welfare plans." *Curtiss-Wright*, 115 S. Ct. at 1228. But it is impossible to reconcile that acknowledged right with the government's notion that reducing future welfare costs by itself — as opposed to targeting individual employees for discharge or discrimination to prevent them from becoming eligible for benefits — can be a prohibited purpose under Section 510.



prohibits conduct intended to prevent employees from reaching benefit eligibility status. In the situation Congress had in mind, the eligibility threshold was the number of years required for vesting, and it would violate Section 510 to terminate an employee just before he reached the required number of years in order to prevent vesting. For a death benefit, an argument can be made that a participant is not eligible to collect a benefit until he dies, and that it would violate Section 510 to terminate an employee just before he died in order to prevent him from being eligible for the benefit. A similar analysis might apply to a participant known to be about to claim other benefits.

However these hypothetical situations may eventually be resolved in appropriate cases, they do not have any bearing on this case. There is no allegation here that the SFTS employees were particularly prone to illness or on death's door. This case does not involve the targeting of particular employees because they were about to become eligible for a claim or benefit. The issue in this case is whether an employer can decide to subcontract work when part of its motivation is the cost of welfare benefits, and neither the language nor the legislative history of Section 510 warrants an interpretation that would prohibit such a fundamental business decision.

4. If Section 510 is read to prohibit employers from taking into account benefit costs whenever they need to make difficult decisions about outsourcing work or reducing operations, every decision to subcontract, every layoff, every plant closure and every other operational change that results in job loss will become a potential federal lawsuit. And because, as the court of appeals pointed out (Pet. App. 8a), motivational issues are not readily resolved at the pleading stage, these lawsuits would impose substantial burdens on employers and on the federal courts.

Perhaps more important, the threat of Section 510 litigation would certainly make employers more reluctant to

provide welfare benefits. Congress realized that more rigorous coverage, vesting and funding requirements for all benefit plans might inhibit the establishment of such plans. See S. Rep. 93-383 at 18-19 (I *Legislative History* 1086-1087). See also *Adams*, 905 F.2d at 947. Accordingly, Congress chose not to require vesting of welfare plans and not to impose upon those plans many of the requirements applicable to pension plans, and it gave employers broad discretion to curtail or eliminate welfare benefits. *Shaw*, 463 U.S. at 90-91. The argument that the same Congress intended Section 510 to preclude subcontracting, plant closures, and similar operational decisions based in whole or in part on a desire to reduce benefit costs defies logic.

## CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.


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In The

# Supreme Court of the United States

October Term, 1996

INTER-MODAL RAIL EMPLOYEES ASSOCIATION, THOMAS FRANKS, CHARLES JONES, TOMMY MARTIN, HOYT JARRARD, and ROBERT STEIN,

*Petitioners,*

*vs.*

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, SANTA FE TERMINAL SERVICES, INC., and IN-TERMINAL SERVICES, DIVISION OF MI-JACK PRODUCTS, INC.,

*Respondents.*

*On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit*

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## INTRODUCTION

Respondents and their *amici* strive to evade facing the only question upon which the Court granted this Petition. They seek to obfuscate with extraneous questions and hyper-technical pleading arguments which are not appropriate either at this stage, *see Scheuer v. Rhodes*, 416 U.S. 232, 235-36 (1974) or at all, *see Conley v. Gibson*, 355 U.S. 41, 47-48 (1957). They seek a *per se* rule that the anti-discrimination requirement imposed by §510 of ERISA, 29 U.S.C. §1140, may never be applied to a "change of operations" resulting in discharge of protected employees, even where an employer changes its operations specifically to interfere with attainment of benefits. Such a rule would directly conflict with the clear language of §510, the holdings of the Third and Seventh Circuits[1] under §510, and the guiding principles of ERISA's purpose and Congressional intent elucidated in *Varity Corp. v. Howe*, 116 S.Ct. 1065, 134 L.Ed.2d 130 (1996). Such a rule would be contrary to the Court's interpretation of every other anti-discrimination law passed by Congress.

Respondent Santa Fe made no "change of operations" in any meaningful sense of that phrase. They did not stop moving containers through their inter-modal system, nor did they "downsize". ATSF continued to conduct its inter-modal business at the Hobart Yard in Los Angeles, using the same cranes and equipment. The only change Santa Fe made was for ATSF to enter into a "contract" with its wholly owned subsidiary SFTS just weeks before it unilaterally canceled that "contract" with SFTS. In March 1991, ATSF then awarded again its inter-modal work subcontract. The "contract" went to ITS to avoid paying benefits to the Teamsters-represented employees at contractually defined levels which the railroad and its wholly owned subsidiary had agreed to

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[1] *Gavalik v. Continental Can Co.*, 812 F.2d 834 (3rd Cir.), *cert. denied*, 484 U.S. 979, 108 S.Ct. 495, 98 L.Ed.2d 492 (1987) and *Kross v. Western Electric Co.*, 701 F.2d 1238 (7th Cir. 1983). *Compare Andes v. Ford Motor Co.*, 70 F.3d 1332 (D.C. Cir. 1995). Even the *Andes* court declined to hold that a change of operations can never as a matter of law implicate §510 liability. *Id.* at 1338.

abide by. Under the Complaint Respondents' conduct was no innocuous "change of operations" but a purposefully designed scheme to reduce the level of employer contributions for benefits set by a valid CBA and federal law, the Multiemployer Plan Act, 29 U.S.C. §1145.

Petitioner alleged termination with the specific intent of depriving of retirement, pension and health and welfare benefits (Pet. Writ. App. IV at 24a-30a). Because the plans, including the health and welfare benefit plan, were "multiemployer" plans (Santa Fe Br. at 8), *see* ERISA §515, Santa Fe could not have unilaterally amended or canceled it as Respondent ITS admits (ITS Br. at 19) ("SFTS could not unilaterally amend or terminate this health plan"). The 1980 amendments to ERISA, including §515, mandated that employers make all required contributions to a multiemployer plan. Engaging in "any transaction" which has as its "principal purpose ... to evade or avoid liability" under a multiemployer plan, incurs liability under ERISA §4212(c), 29 U.S.C. §1392. Other ERISA provisions would have prevented Santa Fe from withdrawing from any of the Teamsters' ERISA-protected plans covering this group of workers who were singled out among all the many workers in an enormous railyard for such treatment. To avoid obvious liability under ERISA Santa Fe in concert with ITS devised a sham subcontract for the inter-modal work, terminated all Teamsters employed in the yard, and lowered the level of employee benefits paid them after they (for the most part) had been rehired.

The Railroad Respondents[2] **concede** that the rationale of the Ninth Circuit's ruling on which this Court granted its Writ of Certiorari was wrong as a matter of law. Their telling concession that the "plain language of Section 510 would apply in cases where an employer takes action to prevent a participant from becoming eligible for welfare benefits" (Santa Fe Br. at 28), is well-nigh

[2] Petitioner uses the terms "Railroad", "Railroad Respondents" and "Santa Fe" to include The Atchison, Topeka & Santa Fe Railway (ATSF) and its wholly-owned and controlled subsidiary Santa Fe Terminal Services (SFTS). Those Respondents jointly filed one brief.



dispositive. Respondents' *amici* do not even seek to justify the court of appeals' opinion on its stated grounds.

Respondents' arguments fail the test of simple logic and consistency. They failed to petition for certiorari; they did not otherwise contest the Ninth Circuit's holding that Petitioner stated a pension interference claim under §510 by alleging that ATSF changed its operations and fired the SFTS employees for the purpose of interference. Now that they are here, however, Respondents argue that the same discharge undertaken for an additional motivation of discriminating against health and welfare benefits, is not actionable under §510 because they made a "change of operations". There appears only one difference between Petitioner's two §510 claims – one involves pension benefits and the other health insurance and welfare benefits. Respondents **repeatedly concede** that §510 prohibits interferences with **both types of benefits** (Santa Fe Br. at 10, 15, 19, and 28).

## ARGUMENT

### I.

### NO EMPLOYER'S CHANGE OF BUSINESS OPERATIONS WHEN TAKEN FOR THE PURPOSES OF RETALIATION OR INTERFERENCE WITH THE ATTAINMENT OF RIGHTS UNDER A HEALTH AND WELFARE BENEFIT PLAN IS IMMUNE FROM SUIT UNDER §510 OF ERISA.

Respondents and their *amici* ask this Court to engraft on this clearly drafted statute a judicially created exception to §510 liability that will encompass anything called a "change of operation". They urge no employer would ever violate §510 of ERISA for subcontracting out work, creating a subsidiary, or closing a portion of its operations **even when** doing so for the purposes of retaliating against or interfering with its employees' contractual right to receive health and welfare benefits at a particular level, for a definite duration or until a proper plan amendment. Their reasoning would permit employers to make the same "changes of operations" for the

purpose of avoiding pension obligations. Obviously their proposal would eviscerate the broad remedial effects of ERISA and undermine this Court's ruling in *Ingersoll Rand v. McClendon*, 498 U.S. 133, 111 S.Ct.478, 112 L.Ed.2d 474 (1990).

Respondents and its *amici* can point to no language in the statute or any legislative history in support of their proposed exception to §510 liability. Congress presumably considered such a reading of its language unacceptable, and clearly it did not speak to this specific issue in discussing §510.[3] One of the House Reports, however, declared that underlying ERISA was Congress'

> **recognition of the necessity for a comprehensive legislative program dealing not only with malfeasance and maladministration in the plans, ... but also with the broad spectrum of questions such as ... plant shut downs and plan terminations**...

H. Rep. No. 533, p.9-10, 93rd Cong., 2d Sess., *reprinted in* 2 Legislative History of the Employment Retirement Income Security Act of 1974, at 2356-75 (Sen. Com't. Print) (hereinafter "Leg. Hist.") and 1974 U.S. Code & Cong. Admin. News at 4647-48 (hereinafter

[3] Respondents' *amici* claim that "none of this legislative history directly addresses whether §510 was intended to prohibit an employer's consideration of benefits costs in taking actions that result in terminations of employment" (*Amici Curiae* Natl. Assoc. Of Mfr. And Assoc. Of Am. Railroads Br. at 15, hereinafter "Resp. *Amici* Br."). Respondents note that the Senate bill originally reported out of committee did not cover employee welfare benefit plans but Congress added protections for those benefits in the final bill signed by President Ford (Santa Fe Br. at 21-25). In reference to §510 Respondents point out that "Senator Williams stated that the legislation contains a 'further protection for employees' insofar as it 'prohibits discharge, or other discriminatory conduct toward participants and beneficiaries which is designed to interfere with the attainment of vested benefits **or other rights under the bill**'" (Santa Fe Br. at 27) (emphasis supplied). These statements are persuasive evidence that Congress intended to regulate against retaliation and interference with health and welfare benefits.



"U.S.C.C. & A.N.") (emphasis added). In their discussions of the legislative history of ERISA Respondents and *amici* ignore this statement of Congressional intent to broadly reach employer efforts that interfere with promised benefits, even changes of operations such as "plant shut downs".

Moreover, Congress broadly worded the statute to prohibit the "discharge" of employees or actions which "discriminate against" employees "for exercising any right" under a plan "or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan". The latter phrase plainly means that Congress intended that §510 prohibit only improperly motivated employer actions.

Petitioner pleaded that Respondents' conspiring to form a sham contract on this part of the inter-modal work with a new employer was taken for the specific purpose of reducing the employees' health and welfare, pension and retirement benefits, all fixed by contract or law. Inasmuch as Petitioner plead an improper motive for Respondents' actions their Complaint states a *prima facie* claim under §510. *DeVoll v. Burdick Painting, Inc.*, 35 F.3d 408, 411 (9th Cir. 1994) (§510 plaintiff has a "very low threshold in establishing a *prima facie* case under ERISA").[4]

In their argument for a "change of operations" exception to ERISA liability Respondents and their *amici* conspicuously omit any discussion of this Court's recent decision in *Varity Corp. v. Howe*, 116 S.Ct. 1065, 134 L.Ed.2d 130 (1996). The Court held that the employer violated ERISA-imposed fiduciary duties by creating a

[4] Respondents point out that Petitioner pleaded multiple motives – each related to reducing employee benefits – for the subcontracting and mass discharge (Santa Fe Br. at 28 n. 15). That ERISA protected only some of the benefits interfered with by Respondents' acts, excluding the Railroad Retirement benefits, does not defeat their liability under §510. In Title VII cases this Court has ruled that an employer's "mixed motives" do not obviate liability. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 241, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989). The Court may apply this same principle to the similarly worded language of ERISA.

"business plan" which "amounted to placing many of Varity's money-losing eggs in one financially rickety basket" all for the purpose of releasing Varity of its obligation to provide health and welfare benefits. 116 S.Ct. at 1068. Varity accomplished this through what appeared on its face as a "normal" change of operations.

*Varity* should have laid to rest any notion that an employer's change of operations is *per se* immunized from ERISA liability. No conceptual purpose differs between §404 and §510 as both statutes prohibit employer actions taken for the purpose of reducing health and welfare benefits. Indeed more so than §404, §510 specifically prohibits actions which interfere with the employment relationship ("discharge, fine, suspend, expel, discipline, or discriminate"). Respondents' failure to distinguish *Varity* is as close to a tacit admission of intellectual bankruptcy as this Court can expect any litigant to make, except for ITS' claim (ITS Br. at 24-25) that this group discharge was a plan amendment.

Not one of the circuit court decisions cited by Respondents and their *amici* in support of their argument hold as a matter of law that §510 can or should never apply to an employer's change of operations. Each court cited by Respondents and their *amici* on the change of operations issue decided the case at the summary judgment stage, after discovery and much evidence of specific intent and legitimate business motivation had been adduced. *See Andes v. Ford Motor Co., supra,* 70 F.3d at 1336 (noting that five of the six circuits to address the question whether a corporate organizational change, like selling a subsidiary, violated §510 "rejected such claims at the summary judgment stage"). The cases cited by the *Andes* court were decided prior to the *Varity* decision. *Varity* made clear that an employer's business plan changing its operational structure as part of a scheme to affect health and welfare benefits could violate ERISA.

The Railroad Respondents and their *amici* heavily rely upon the D.C. Circuit's *Andes* decision. Even that case did not rule out the employees' allegations under §510 on the pleadings. The *Andes* court declined to hold as a matter of law that §510 of ERISA never would apply to an employer's change of operations: "This is not to



say that §510 could never be implicated in a company's basic organizational decision". *Id.* at 1338. That court of appeals went on to state that a sale or closure of entire unit of a business **could** violate §510 if the employees could show that many of the employees in the company unit were soon to become eligible for benefits and the employer knowing this decided to shut down or sell the unit. *Id.* Here, the Railroad did not sell its inter-modal business or shut down the Hobart Yard but continued the same work in the same place while breaking out of the existing CBA and reducing the contractually defined level of benefits. ITS did not bring in new tools or computers to do the inter-modal work. It even used Santa Fe's cranes and most all the same employees. The only "efficiency" ITS offered Santa Fe was to reduce the level of employee benefits. Respondents' specific intent to interfere with employee benefits appears on the face of this sham transaction.

Other circuit courts have found that under particular facts an employer's change of operations did violate §510 because the specific intent or illegal motivation element was met. In *Gavalik v. Continental Can Co., supra,* the Third Circuit, Chief Judge Higginbotham writing, held that the employer's plan to reduce its pension liabilities by transferring work to other plants and closing down entire plants that had numerous employees who were about to attain vesting status violated §510. 812 F.2d at 841. In *Kross v. Western Electric Co., supra,* the Seventh Circuit held that an employer violated §510 by discharging large groups of employees as part of an ostensible workforce reduction because the court found that the real motive for the layoffs was to "avoid continuing to make payment for [their] company-provided life and medical insurance". 701 F.2d at 1239. The salient point is that courts must decide each §510 case, just as in other employment discrimination claims, on its particular facts to determine whether a plaintiff has pleaded and proven the "purpose" or motivation or specific intent element of the cause of action. *See, e.g., Price Waterhouse, supra* and *Dyrt v. Mountain States Tel. & Tel.*, 921 F.2d 889, 896 (9th Cir. 1990) (courts "must be particularly cautious when reviewing a district court's decision to grant summary judgment where issues of intent or motivation are involved").

Respondents' argument that §510 can never apply to an employer's change of operations motivated by an intent to reduce the level of health and welfare benefits guaranteed for a term of years fails from internal illogic. If Respondents were correct about the immateriality of an improper health and welfare benefits motivation as applied to a group of employees, then the same logic would deprive employees of a §510 claim when their employer changes operations for the purpose of depriving them promised future pension benefits. Respondents did not, however, petition for certiorari on that part of the Ninth Circuit's ruling upholding Petitioner's §510 claim against Respondents for interfering with the employees' Teamsters pension benefits in the same "change of operations" (Writ. App. IV at 8a). Respondents' argument suffers from terminal cynicism; they would require this Court to overrule its 1990 decision in *Ingersoll-Rand v. McClendon, supra.* To uphold Respondents' plea that the Court graft a new exception onto the statute, this Court would have to produce an anomalous interpretation of the scope of §510 inconsistent with the law's clear language.

## II.

## PETITIONER PROPERLY ALLEGED THAT RESPONDENTS WERE MOTIVATED BY THE REQUISITE SPECIFIC INTENT TO INTERFERE WITH THE EMPLOYEES' HEALTH AND WELFARE BENEFITS.

Respondents, and especially their *amici*, argue that an employee can never "show" the requisite "specific intent" to interfere with the attainment of plan benefits where the only motivation for the employment termination was to save the employer the "normal costs of a participant's future benefits" (Resp. *Amici* Br. at 4, 10-11).[5]

[5] Courts have interpreted the ADEA to prohibit employers from discharging or discriminating against employees in the protected group because those employees cost more to hire or retain in employment. *See, e.g., Metz v. Transit Mix, Inc.*, 828 F.2d 1202, 1205 (7th Cir. 1987). Congress designed ERISA to provide rights to employees "like the [NLRA], the wage-hour laws, and other labor standards laws". 2 Leg. Hist. at 2356 and 1974 U.S.C.C. & A.N. at 4647.



Read in the context of this case, that argument has no support in the language or the history of the statute, and neither Respondents nor its *amici* cite to any. This case does not present facts where the CBA providing benefits had expired and the employer was determining what benefit package it could afford. Of course, in that instance an employer legitimately could consider the costs of providing benefits. Similarly, no allegation has been made that the Railroad Respondents had a unilateral right, by contract or law, to modify the multiemployer plan which set the level of benefits for a particular term. Indeed, Congress compelled employers in a multiemployer plan to make all contributions required by the CBA. ERISA §§515 and 4212(c). This Court explained that

> [t]he legislative history of these provisions explains that Congress added these strict remedies to give employers a strong incentive to honor their contractual obligations to contribute and facilitate the collection of delinquent accounts

under multiemployer plans. *Laborers Health & Welfare Trust v. Advanced Lightweight Concrete Co.*, 484 U.S. 539, 547, 108 S.Ct. 830, 98 L.Ed.2d 936 (1988).

In this case Petitioner pleads that Respondents' motivation for the subcontracting was a unilateral reduction in the level of benefits promised to the employees in the multiemployer plan.[6] Respondents did so by concocting a business plan to suddenly award a contract to SFTS for the inter-modal work (the first ever contract between ATSF and SFTS after SFTS had performed the same work for dozens of years), cancel that "contract" a few weeks later, and enter into a conspiracy with ITS to take over the work but to offer the employees a decreased package of benefits. Under the applicable CBA and federal law (including the NLRA, *see* ITS Br. at 10)

[6] Respondents' *amici* nearly concede that discharging employees to achieve large benefit cost savings evidences the necessary specific intent under §510: "[t]he fact that the employer's benefit cost savings may be greatly multiplied if many employees are terminated raises the specter of a greater motivation related to benefit costs" (Resp. *Amici* Br. at 10).

Respondents had no right to unilaterally reduce the package of employee benefits.

When it enacted ERISA and the amendments thereto, Congress drew a bright line of **when** and **how** an employer may permissibly consider the costs of providing health and welfare benefits.[7] Thus, §510 prohibits an employer from achieving a change in employee benefits by "discharg[ing]" or otherwise "discriminat[ing]" against its employees for "exercising any right" under a plan "or for the purpose of interfering with the attainment of any right to which the [employee] may become entitled under the plan". The clarity of the duties imposed by §§510, 515, and 4212(c) of ERISA is such that Respondents and *amici* must direct their policy arguments to Congress. *Advanced Lightweight Concrete*, 484 U.S. at 551.

Respondents' "policy" argument that recognition of a §510 cause of action under the facts pleaded in this case "provide[s] such a powerful disincentive to the creation of welfare benefit plans" (Santa Fe Br. at 12) is wholly unsupported by the record, legislative history or any other authority. That argument could be advanced to eliminate all of the duties and obligations imposed by Congress on employers in ERISA. Indeed, in enacting §510 and the 1980 amendments to ERISA Congress created a powerful incentive for employers to honor their promises to employees to maintain benefits at the level set in the multiemployer plans which exist for the duration of the CBA. Respondents improperly look to this Court to change the words and sound policies of ERISA.

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[7] If the employer found mid-contract that it was losing money and could not afford the benefit levels set by the CBA, the duties and rights imposed by ERISA and the NLRA require the employer to bargain with the employees' representative to reach a mutually agreeable change in the benefits package. Neither ERISA nor the NLRA grant to the employer the unilateral right to alter the package of benefits provided under a multiemployer plan by simply subcontracting its work to a successor that can negotiate a lower package of benefits and refuse to hire the employees who worked for the predecessor.



## III.

## RESPONDENTS READ THE "ATTAINMENT" CLAUSE OF §510 TOO NARROWLY IN LIGHT OF ITS BROAD LANGUAGE AND THE BROAD REMEDIAL PURPOSES OF ERISA.

The Railroad Respondents and their *amici* seem to argue that the only application for the "attainment clause" of §510 is if an employer discharged or discriminated against an employee when the employer knew that the employee or beneficiary was ready to make a health insurance claim (Resp. *Amici* Br. at 17) or was about to "reach that threshold of eligibility in order to avoid the expense of that benefit" (Santa Fe Br. at 17-18).[8] Nothing in the intent, purpose or language of the statute compels that any such restrictive gloss be implied. Moreover Respondents and their *amici* avert from the principle that not every possible application of a statute need be mentioned by Congress. *Moskal v. U.S.*, 498 U.S. 103, 111 S.Ct. 461, 112 L.Ed.2d 449 (1990).

The second clause of §510 prohibits adverse employment actions undertaken **"for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan"** (emphasis added). In *Varity* this Court repeated Congress' intent that ERISA provide "broad remedies for redressing or preventing violations" of the statute, and that it enacted

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[8] The members of IMREA were all eligible to make Teamsters health and welfare benefits claims at the time of their discharge. ATSF in effect argues for the anomalous result that, once the employees had attained eligibility for benefits, the employer could discharge them in order to reduce its health and welfare liabilities. That continuation coverage may be available to employees after discharge pursuant to the COBRA amendment to ERISA, 29 U.S.C. §§1161 *et seq.*, is immaterial to the illegality of the employer's conduct under §510, despite what ATSF suggests (Santa Fe Br. at 35 n.21). COBRA coverage is not the same as employer-provided group health insurance. COBRA does not compel continuation coverage of other employee welfare benefits covered by ERISA such as vacation and sick pay, 29 U.S.C. §1002(1).

ERISA "to protect ... the interests of participants ... by establishing standards of conduct, responsibility, and obligation ...". 116 S.Ct. at 1078, *quoting* 1 Leg. Hist. at 621 and §2(b) of ERISA. In light of the broad purposes of ERISA, the Court resoundingly declared that the action of Congress in specifically prohibiting certain acts and conduct should not be construed as any intent to limit the scope of ERISA. *Id.* at 1077-79. Contracting away work and discharging employees for the purpose of lowering benefit levels prevents employees from retaining their eligibility to make claims for health and welfare benefits for the duration of the multiemployer plan in effect at the time of discharge. Respondents ignore that every discharged employee was covered by a multiemployer plan, and not through an employer's health insurance program. So the Santa Fe's contribution levels for any increasing benefits would have arisen only at the time of negotiating a new CBA. Thus their self-justification falls under the weight of the facts clearly known to them.

ATSF argues that Congress should have added specific language to the attainment clause if it intended it to have the plain meaning Petitioner and the Government avow (Santa Fe Br. at 32-33). When interpreting federal statutes this Court has never held that Congress was required to list each and every specific prohibited act. *See Moskal v. U.S.*, 498 U.S. at 111. In enacting §510, Congress expressed the intent that it would prohibit any employer action designed to interfere with the attainment of rights under a benefit plan, including such acts as "constructive" discharge (where the employee resigns employment because the employer made it so uncomfortable) even though the specific discriminatory act was not listed in the statute. 120 Cong. Rec. 737, *reprinted in* 2 Leg. Hist. 1774-5, and 1974 U.S.C.C. & A.N. 5177, 5188 (statements of Sen. Williams).

Respondents' reliance (Santa Fe Br. at 19-28) on ERISA's legislative history is equally unavailing. Notwithstanding Respondents' exhaustive chronology of the bills that became ERISA, they point to nothing that supports their construction of the term "attainment" as a limiting factor in §510's interpretation. There is affirmative indication in the legislative history as well that the provision precludes interference with the attainment of other rights.



Respondents are in error in contending (Santa Fe Br. at 21) that the initial Senate bill, S.4, related only to pension plans and thus the attainment clause as initially enacted could only have been intended to protect benefits capable of vesting. The precursor of §510 – §610 of S.4 – appeared in Title VI of S.4, and that title of the bill applied to pension plans, profit-sharing plans, and any plan covered by the Welfare and Pension Plans Disclosure Act (WPPDA). *See* S.4, §104(d), §610, *reprinted* in 1 Leg. Hist. at 506, 585. The WPPDA, as its name suggests, applied to both pension and welfare benefit plans. Pub. L. 85-836, 72 Stat. 998.

This Court, in *Robinson v. Shell Oil Co.*, No. 95-1376, 65 U.S.L.W. 4103 (U.S., Feb. 18, 1997), unanimously refused an invitation to require extensive definition of "employee" in Title VII. Justice Thomas wrote that such narrow reading of that statute "would effectively vitiate much of the protection" offered by the law and would "provide a perverse incentive for employers to fire employees". *Id.* at 4105. The Court found "persuasive force" for interpretation of the statute in arguments whose "coherence and ... consistency with a primary purpose of the anti-retaliation provisions: maintain[ed] unfettered access to statutory remedial mechanisms". *Id.* at 4105. Similar considerations here should persuade the Court to reject Respondents' and *amici's* extremely narrow interpretation.

Moreover, Respondents' "attainment" argument provides no textual support for its theory that §510 cannot apply to employment actions taken in the context of operational changes or cost-cutting "fundamental business decisions". There is nothing in the concept of "attainment" or in §510 that limits the provision's scope to individual employment decisions or precludes its applicability to the treatment of a class of employees, such as those working in an organizational unit. *Gavalik*, 812 F.2d at 853, 857 (upholding class claim under §510). Rather, the focus is upon whether employment decisions are carried out with the improper purpose of interfering with the attainment of benefits. *Cf. Seaman v. Arvida Realty Sales*, 985 F.2d 543 (11th Cir.), *cert. denied*, 510 U.S. 916, 114 S.Ct. 308, 126 L.Ed.2d 255 (1993) ("[t]he validity of a §510 claim ... hinge[s] ... upon the purpose of the discharge").

## IV.

## RESPONDENT AND ITS *AMICI'S* ARGUMENT THAT §510 NARROWLY APPLIES ONLY TO DISCRIMINATION AGAINST INDIVIDUAL OR IDENTIFIABLE PARTICIPANTS HAS NO SUPPORT IN THE STATUTE.

Respondents' *amici* argue that §510 can prohibit only discriminatory employment practices "targeting individual employees" to "prevent identifiable participants from attaining specific benefit rights" (Resp. *Amici* Br. at 13-14). In their next breath, however, *amici* admit that "more than one participant could be targeted for the same reason, and a group of such participants may assert their claims in a single action" (Resp. *Amici* Br. at 14). *Amici* cite no provision in the statute or the history of ERISA which would justify their "targeting" proposal. In *Varity* this Court made it clear that ERISA can prohibit an employer from harming large groups of its employees for purposes of fulfilling an improper business plan.

The courts never have required Congress to word anti-discrimination statutes in the singular and plural to protect groups of employees from employer conduct designed to discriminate against multiple employees. Thus, the ADEA and Title VII both prohibit employers from adopting workforce reduction plans with the intent to discriminate against employees on the basis of their status. *See Armbruster v. Unisys Corp.*, 32 F.3d 768 (3rd Cir. 1994) and *Bell v. AT & T*, 946 F.2d 1507, 1510 n.1 (10th Cir. 1991). Like §4(a) of the ADEA (unlawful to discriminate against "any individual") and §703(a) of Title VII (unlawful to "discriminate against any individual") §510 of ERISA identifies those protected in the singular ("participant" and "beneficiary").

ITS argues that Respondents did not discriminate against the members of Petitioner Association because Santa Fe treated all its Teamsters employees the same – the Railroad subcontracted out their work, terminated them, and forced them to seek employment from a successor which lowered their contractual level of benefits (ITS Br. at 21). ITS' unsupported conclusion of no disparate treatment ignores that Petitioner has not alleged the Railroad Respondents



changed the benefit levels of the other persons at the Hobart Yard such as the switchmen, brakemen, engineers, and the like. Looking at the railyard as a whole, under the inferences reasonably taken from the Complaint, Respondents treated the Teamsters-represented employees different from the other ATSF employees in order to discriminate against them for the purpose of interfering with their right to attain benefits. *See Hishon v. King & Spaulding*, 467 U.S. 69, 75, 104 S.Ct. 2229, 81 L.Ed.2d 59 (1984).

In arguing (Santa Fe Br. at 11-12) that Petitioner's interpretation of §510 prevents employers from taking benefit costs into account in making important operational decisions, Respondents overstate the breadth of our interpretation and distort the effects of a ruling in IMREA's favor. *See, e.g.*, Santa Fe Br. at 12 ("if Petitioner is correct, an employer who decides to close one plant rather than another or to scale back operations at one plant rather than another would violate §510 if the higher costs at the affected plant were attributable to welfare benefits"). In order to establish a violation of §510, a plaintiff must prove that her employer undertook the employment action at issue with specific intent to interfere with the attainment of benefit rights; it does not suffice to show that the loss of benefits was the consequence of her discharge.[9] *Unida v. Levi Strauss & Co.*, 986 F.2d 970, 979-80 (5th Cir. 1993); *Seaman v. Arvida Realty Sales*, *supra*, 985 F.2d at 546; *Gavalik v. Continental Can Co.*, *supra*, 812 F.2d at 853. Moreover, as part of her *prima facie* case, §510 a plaintiff must submit evidence showing such a specific intent to interfere with the attainment of benefits. *Gavalik*, 812 F.2d at 853. This specific intent requirement defuses Respondents' argument (Santa Fe Br. at 14) that our interpretation

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[9] The allegations in the Complaint, which must be taken as true at this stage of the proceeding, clearly allege a specific intent to deprive Petitioner of the attainment of ERISA-covered benefits. *See* Pet. Writ. App. IV at 30a, ¶37 ("defendants in violation of 29 U.S.C. §1140, agreed and conspired to intentionally interfere with plaintiff's employment relationship and legitimate expectancy of continued employment for the express purpose of depriving plaintiff of most, if not all of the substantial, ERISA-protected "fringe" benefits of their employment with SFTS, as alleged in the proceeding paragraphs").

"will convert every cost-cutting operational change into a federal lawsuit in which the defendant will effectively have the difficult burden of proving that it did not act with the supposedly improper intent". *Cf. Seaman*, 985 F.2d at 546 (specific intent component of §510 "defuses the argument that §510 protection will turn every discharge into a §510 violation").

In a "contracting-out" situation, assuming no contractual or other legal duty to continue paying benefits, a mere showing that the employer wished to cut costs without more proof would not ordinarily establish that its discharge of employees via the contracting-out process was motivated by a specific purpose to interfere with their attainment of benefits rights, within the meaning of §510. The inquiry in such a hypothetical would focus on whether the employer can establish why discharge was required in lieu of plan amendment, for example, or the *bona fide* nature of the cost-cutting. An employer does not necessarily have a specific intent to violate §510 by entering into an arms-length agreement to contract-out work based on an attractive price offered by a contractor. But where the contractor is not at arm's length, or where the contractor's ability to do the work at the attractive price reflects in a substantial sense no more than the lower benefits that the contractor will pay the employees taking over the work, then the specific intent may be inferred. An employer's decision to discharge and contract out in such circumstance (rather than amend its plan) is far more indicative of a prohibited motive than of legitimate desire to save costs. Moreover, even though an employer, in comparing its costs to a contractor's *bona fide* bid, undoubtedly takes into account its own labor costs attributable to benefits, that consideration generally will not negate any specific intent to deprive its employees of benefits. This is especially true when the new contract's savings reflect substantially no more than the cost of the benefits avoided. Section 510 thus does not prohibit an employer from considering its labor costs and seeking to reduce them, so long as it does not take adverse employment actions or, when it does, those adverse employment actions are not taken for the specific purpose of interfering with employees' attainment of benefits.



In a case such as this, where the employer and contractor prearranged that the contractor would hire (or rehire) its employees with lower benefits, the inference arises that the employer undertook the employees' discharge for the specific purpose of interfering with the employees' attainment of benefits. Such a case is qualitatively worse than an employer who discharges an individual who is about to vest and replaces him with a new individual who will not vest for years (which Respondents concede (Santa Fe Br. at 18) is the paradigm of a §510 violation). In each case the employer discharges an individual for the purpose of replacing him with someone who is ineligible for benefits. The fact that the employer has taken such action as to a group of individuals does not affect the appropriate inquiry under the statute – whether the action was taken for the purpose of interfering with employees' attainment of benefits.

## V.

## ITS' ARGUMENT THAT RESPONDENTS HAVE NO LIABILITY UNDER §510 OF ERISA RESTS ON A FAULTY ASSUMPTION ABOUT CONDUCT PERMITTED BY THE NLRA.

ITS argues that Respondents have an affirmative defense to Petitioner's §510 claim in that the conduct of Respondents supposedly was permissible under the NLRA. Petitioner concedes the existence of no affirmative defense [under the NLRA] to this claim under ERISA. Moreover, it is not clear whether the NLRA permitted Respondents' conduct or if those actions constituted unfair labor practices.

Because conduct may not violate the NLRA does not mean that employees are precluded from pursuing remedies independent of the NLRA. *Cf. Barrentine v. Arkansas-Best Freight System*, 450 U.S. 728, 736-37, 101 S.Ct. 1437, 67 L.Ed.2d 641 (1981). This Court has repeatedly held that simply because conduct may constitute an unfair labor practice does not restrict remedies under state or other federal laws. *See, e.g., Farmer v. Carpenters*, 430 U.S. 290, 304, 97 S.Ct. 1056, 51 L.Ed.2d 338 (1977) (state law claim for intentional infliction of emotional distress permissible even though same

conduct could constitute an unfair labor practice) and *Advanced Lightweight Concrete Co., supra*, 484 U.S. at 550-53 (ERISA §515 provides remedies for employers failure to make contributions to multiemployer benefit plan under existing CBA even though conduct also is an unfair labor practice). That the Railroad Respondents' failure to bargain over the change in the terms and conditions of employment may or may not have violated the NLRA thus has no effect on Petitioner's ERISA rights to a remedy for the discharge and discrimination undertaken for the purpose of interfering with their health and welfare benefits.

ITS incorrectly argues that ATSF's subcontracting of the inter-modal work performed by the employees represented by the Teamsters union, while an existing CBA between SFTS and the Teamsters was in force, was "expressly permitted" by the NLRA (ITS Br. at 16).[10] Petitioner did not allege and Respondents presented no evidence that the Railroad Respondents attempted to bargain with the Teamsters over their desire to reduce the employee benefits provided to the inter-modal workers. Likewise, Petitioner did not allege and no Respondent presented any evidence that the Railroad Respondents attempted to bargain with the Teamsters over the Railroad's decision to subcontract this work to a non-railroad employer. ITS acknowledges that an employer like Santa Fe has a duty under the NLRA to bargain about subcontracting when the employer's motive is to lower its labor costs (ITS Br. at 11-12, *citing Fibreboard Paper Products v. N.L.R.B.*, 379 U.S. 203, 213-14, 85 S.Ct. 398, 13 L.Ed.2d 233 (1964)). Thus, on the record before the Court Respondents' conduct was not protected by the NLRA.

The purported legality under the NLRA of Respondent ITS' conduct as a successor employer is likewise a question not susceptible of resolution on this record. ITS acknowledges that "in most cases" (but not all) a successor employer is free to set the initial terms and conditions of employment after negotiating with the

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[10] Interestingly, neither of the Railroad Respondents even attempted to claim that their actions complied with the NLRA or the LMRA. Indeed, the Railroad Respondents did not address this issue in their joint brief.



employees' existing union representative. *N.L.R.B. v. Burns International Security Services*, 406 U.S. 272, 294, 92 S.Ct. 1571, 32 L.Ed.2d 61 (1972) ("a successor employer is **ordinarily** free to set initial terms on which it will hire the employees of a predecessor") (emphasis added). ITS' illegal conduct pleaded in the Complaint was to conspire with the Railroad Respondents to violate §510 of ERISA by agreeing to perform the same work at the same place with the same equipment and employees, but to force the employees to accept (on pain of unemployment) benefits lower than those provided in the existing CBA (Writ Pet. App. at p. 24a-30a). At this stage the Court cannot resolve the question of whether forcing these employees to accept lower benefits than in their contract constituted **good faith** bargaining by a successor employer. *Fall River Dyeing & Finishing Corp. v. N.L.R.B.*, 482 U.S. 27, 42-3, 107 S.Ct. 2225, 96 L.Ed.2d 22 (1987) and *N.L.R.B. v. Ins. Agents' Int'l. Union*, 361 U.S. 477, 484-85, 80 S.Ct. 419, 4 L.Ed.2d 454 (1960).

Nothing in the Complaint or the briefs of Respondents shows that the Railroad Respondents attempted to bargain over any supposed need to reduce the level of employee benefits before contracting away these Teamsters' work. Although it is immaterial here whether Santa Fe's failure to bargain breached their obligations under the NLRA, such could be evidence of improper motive and intent for the §510 claim. Material fact questions exist on whether Respondent ITS, the sham successor "employer" (it took over this inter-modal work at the Hobart Yard with most of the same employees and the same equipment, as alleged in the Complaint) bargained in good faith over the terms and conditions of employment. Whether that was an unfair labor practice by Santa Fe and/or ITS is likewise legally immaterial to these ERISA claims. Also immaterial here as a matter of ERISA law is ITS' claim to have committed no unfair labor practices. But one must observe that conspiring with an employer to aid it in committing an unfair labor practice – unilaterally changing the terms and conditions of employment – hardly sets up any conflict between the NLRA and ERISA §510.

## CONCLUSION

The Court should reverse the part of the Ninth Circuit's ruling that upheld the dismissal of Petitioner's claim under §510 of ERISA for interference, by discharge from their employment with SFTS, with the rights of IMREA's members to receive and make claims for health and welfare insurance benefits, and remand the case to the District Court for trial in accordance with the Court's decision.

Respectfully submitted,

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**Supreme Court of the United States**
OCTOBER TERM, 1996

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**INTER-MODAL RAIL EMPLOYEES ASSOCIATION, THOMAS FRANKS, CHARLES JONES, TOMMY MARTIN, HOYT JARRARD, AND ROBERT STEIN,**
***Petitioners,***

v.

**THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, SANTA FE TERMINAL SERVICES, INC., and IN-TERMINAL SERVICES, DIVISION OF MI-JACK PRODUCT, INC.,**
***Respondents.***

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**Petition for Writ of Certiorari**
**To The United States Court Of Appeals**
**For The Ninth Circuit**

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# BRIEF *AMICI CURIAE* OF THE AMERICAN ASSOCIATION OF RETIRED PERSONS AND THE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION IN SUPPORT OF PETITIONERS

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No. 96-491

IN THE
**Supreme Court of the United States**
OCTOBER TERM, 1996

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**INTER-MODAL RAIL EMPLOYEES ASSOCIATION, THOMAS FRANKS, CHARLES JONES, TOMMY MARTIN, HOYT JARRARD, AND ROBERT STEIN,**
***Petitioners,***

v.

**THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, SANTA FE TERMINAL SERVICES, INC., and IN-TERMINAL SERVICES, DIVISION OF MI-JACK PRODUCT, INC.,**
***Respondents.***

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**Petition for Writ of Certiorari**
**To The United States Court Of Appeals**
**For The Ninth Circuit**

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# BRIEF *AMICI CURIAE* OF THE AMERICAN ASSOCIATION OF RETIRED PERSONS AND THE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION IN SUPPORT OF PETITIONERS

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## STATEMENT OF INTEREST OF *AMICI CURIAE*

The American Association of Retired Persons (AARP) is a nonprofit membership organization of more than 33 million persons age 50 or older that is dedicated to addressing the needs and interests of older Americans. Approximately thirteen million of AARP's members are under age sixty-five. They are generally not eligible for Medicare and, therefore, rely on employer-funded health benefits. Since the day that AARP was founded in 1958,

access to health care has been a major association priority. One method to increase access to health care is to increase the availability, security, equity, and adequacy of employer-funded welfare plans.

The National Employment Lawyers Association (NELA) is a voluntary organization, founded in 1985, of approximately 3,000 attorneys who specialize in representing individuals in controversies arising out of the workplace. It is the country's only professional membership organization comprised of lawyers who represent employees in cases involving employment discrimination, employee benefits, wrongful discharge, and other employment-related matters. NELA has devoted itself to supporting precedent-setting litigation affecting the rights of individuals in the workplace.

AARP and NELA are qualified to brief the Court on the implications of the decision in this case, having participated as *amicus curiae* in numerous cases involving the Employee Retirement Income Security Act (ERISA), including *Varity Corp. v. Howe*, 116 S. Ct. 1065 (1996), *John Hancock Mutual Life Insurance Co. v. Harris Trust & Savings Bank*, 510 U.S. 86 (1993), and *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989).

AARP's members, NELA members' clients and other participants in employee benefit plans rely on ERISA to protect their rights under private employer-sponsored employee benefit plans. 29 U.S.C. § 1001 *et seq.* Thus, ERISA's protections, and the ability to enforce those protections, are of vital concern to older workers and retirees, since the quality of their lives in retirement depends heavily upon the security and amount of their employee benefits. In particular, they depend on ERISA's protections against an employer's intentional actions designed to deprive them of those benefits.

The decision in this case will have a direct and vital bearing on the economic security of AARP's members, NELA members' clients and other participants of welfare



plans. In light of the significance of the issues presented by this case, AARP and NELA respectfully submit this brief *amici curiae*.[1/]

## SUMMARY OF ARGUMENT

The plain language of ERISA § 510 protects participants from interference with rights attainable under welfare benefit plans. Congress did not distinguish between pension and welfare plans, vested and non-vested benefits, or present and future benefits in ERISA § 510, although it did in other sections of ERISA. *Russello v. United States*, 464 U.S. 16, 23 (1983). Moreover, the protection of welfare plan rights under § 510 is consistent with ERISA's structure regarding reporting and disclosure, fiduciary responsibilities and preemption of state law claims. Finally, the legislative history of § 510 corroborates this interpretation of the plain language of the statute. The conference report clearly shows that Congress wanted to protect a participant against interference with any current or future rights attainable under any type of employee benefit plan. H. R. CONF. REP. NO. 1280, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S. Code Cong. & Admin. News 5038, 5110.

## ARGUMENT

### I. ERISA § 510 PROTECTS PARTICIPANTS FROM INTENTIONAL INTERFERENCE WITH THEIR WELFARE BENEFITS.

The issue before this Court is whether ERISA § 510 protects participants' welfare benefits from discriminatory interference. A first step in statutory analysis is an examination of the statute's plain language. "[A]ny exercise of statutory construction [begins] with the text of

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[1/] The written consent of each party has been filed with the Clerk of the Court pursuant to Supreme Court Rule 37.3.

the provision in question, and move[s] on, as need be, to the structure and purpose of the Act in which it occurs." *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co.*, 115 S. Ct. 1671, 1677 (1995); *see, e.g., Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 138 (1990) ("To discern Congress' intent we examine the explicit statutory language and the structure and purpose of the statute.").

To interpret a statute, one must "`begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.'" *FMC Corp. v. Holliday*, 498 U.S. 52, 57 (1990) (*quoting Park 'N Fly, Inc. v. Dollar Park and Fly, Inc.*, 469 U.S. 189, 194 (1985)); *see also Patterson v. Shumate*, 504 U.S. 753, 757 (1992) ("The plain language of . . . ERISA is our determinant."). Even if the statutory language is unambiguous, the context in which the language is used should be scrutinized in order to confirm its true meaning. *King v. St. Vincent's Hospital*, 502 U.S. 215, 221 (1991) ("the meaning of statutory language, plain or not, depends on context"). As a last step, a review of the legislative history may assist in determining, or corroborating, the meaning of the statutory language. *Blum v. Stenson*, 465 U.S. 886, 896 (1984) ("Where . . . resolution of a question of federal law turns on a statute and the intention of Congress, [courts] look first to the statutory language and then to the legislative history if the statutory language is unclear.").



### A. The Plain Language Of ERISA § 510 Protects Participants From Intentional Interference With Rights Attainable Under Welfare Benefit Plans.

#### 1. The plain language of ERISA § 510 does not distinguish between pension and welfare plans.

Section 510 provides in pertinent part:

> It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan . . . . or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan . . . .

29 U.S.C. § 1140.

By its terms, § 510 prohibits employers from discriminating against employees for the purpose of interfering with benefits to which they are or may become entitled under any type of employee benefit plan. The general "Definitions" section of ERISA makes it quite clear that the term "an employee benefit plan" includes a welfare plan. *See* 29 U.S.C. § 1002(3) ("The term 'employee benefit plan' or 'plan' means an employee welfare benefit plan or an employee pension benefit plan or a plan which is both an employee welfare benefit plan and an employee pension benefit plan"). A "welfare plan" is established for the purpose of providing medical, surgical or hospital care. *See* 29 U.S.C. § 1002(1).

If Congress had wanted to protect only pension plans under § 510, it could have easily done so by using the term "employee pension benefit plan" in § 510. Indeed, Congress provided a specific definition of a pension plan in ERISA. *See* 29 U.S.C. § 1002(2). But

Congress chose to use the broader term -- "employee benefit plan" -- in § 510. Quite simply, the words of § 510 do not limit their application to only employee pension plans. *Russello v. United States,* 464 U.S. at 23 ("where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion . . . .") (internal quotation marks omitted).

**2. The plain language of ERISA § 510 does not distinguish between vested and non-vested benefits.**

Not only is there no distinction between pension and welfare plans in the plain language of § 510, but there is also no distinction between vested and non-vested benefits in the language. *Heath v. Varity*, 71 F.3d 256, 258 (7th Cir. 1995) (holding that termination to prevent attainment of nonvested welfare benefits is actionable under § 510). *Accord, Shahid v. Ford Motor Co.*, 76 F.3d 1404, 1411 (6th Cir. 1996) (§ 510 "does not limit its application to benefits that will become vested"); *Seaman v. Arvida Realty Sales,* 985 F.2d 543, 546 (11th Cir.), *cert. denied,* 510 U.S. 916 (1993) ("the validity of a § 510 claim does not hinge upon whether the benefits involved are vested but upon the purpose of the discharge"). Section 510's lack of distinction between vested and non-vested benefits is logical given that pension plans include some vested benefits, while welfare plans generally do not.[2/]

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[2/] Although ERISA does not provide a schedule for vesting welfare benefits, an employer may agree to vest welfare benefits, or waive its ability to terminate or unilaterally amend a plan. *See, e.g., Schonholz v. Long Island Jewish Medical Center,* 87 F.3d 72 (2d Cir.), *cert. denied*, 117 S. Ct. 511 (1996); *Helwig v. Kelsey-Hayes*, 93 F.3d 243 (6th Cir. 1996); *Bidlack v. Wheelabrator*, 993 F.2d 603 (7th Cir.), *cert. denied*, 510 U.S.

(continued...)



*Heath v. Varity, supra.* When Congress meant to apply a particular statutory section only to vested benefits, it did so. *See, e.g.*, ERISA §§ 203 & 205(a), 29 U.S.C. §§ 1053 & 1055(a). If Congress meant to have § 510 apply only to vested benefits, it could have done so. It did not. *Russello v. United States,* 464 U.S. at 23.

Moreover, to only protect vested benefits under § 510 would render it meaningless because by definition vested benefits are already protected. *See* ERISA §§ 3(19) & 203, 29 U.S.C. §§ 1002(19) & 1053. Indeed, if § 510 distinguished between vested and non-vested benefits, ERISA would fail to protect employees who are terminated prior to their pension benefit vesting, thus eviscerating a primary purpose of the statute. 1974 U.S. CODE CONG. & ADMIN. NEWS 4838, 4872. Since § 510 protects employees non-vested pension benefits, it should also protect an employee from an employer terminating him or her just before hospitalization for an expensive procedure.

**3. The plain language of ERISA § 510 does not distinguish between present and future benefits.**

The scope of § 510 includes not only any right to which a participant is already entitled under a plan, but also any right to which he or she may become entitled under a plan. Thus, Section 510 does not distinguish between present and future benefits. *Ingersoll-Rand v. McClendon,* 498 U.S. at 143; *Tingey v. Pixley-Richards West, Inc.*, 953 F.2d 1124, 1131 (9th Cir. 1992) (§ 510 claim where participant was discharged because his dependent would have costly future medical condition); *Conkwright v. Westinghouse Elec. Corp.,* 933 F.2d 231, 238 (4th Cir. 1991) (§ 510 claim where a participant was

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[2/] (...continued)
909 (1993); *Wise v. El Paso Natural Gas Co.*, 986 F.2d 929 (5th Cir.), *cert. denied,* 510 U.S. 870 (1993)

discharged to prevent the accrual of additional pension benefits); *Kross v. Western Electric Co.*, 701 F.2d 1238, 1241-43 (7th Cir. 1983) (§ 510 claim where an employee was discharged for the purpose of depriving him of continued participation in his employer's medical plan; rejection of argument that once an employee attains a right under a plan, the employee cannot attain any additional rights under that plan). *See also Vicinanzo v. Brunschwig & Fils, Inc.*, 739 F. Supp. 882, 885 (S.D.N.Y. 1990) ("interference with rights arising in the future is no less actionable than interference with present rights"); *Folz v. Marriott Corp.*, 594 F. Supp. 1007 (W. D. Mo. 1984) (discharge shortly after diagnosis of multiple sclerosis to prevent attainment of rights under long term disability and health plans).

Petitioners pled that the employers' actions were taken for the purpose of depriving them of their rights under an employee benefit plan, and thus their Complaint must survive a motion to dismiss.[3/]

### B. Section 510's Protection Of Rights Attainable Under Welfare Plans Is Consistent With The Structure of ERISA.

Construing § 510 to protect both welfare and pension plans is consistent with the structure of ERISA. Part 1 of ERISA imposes reporting and disclosure requirements for employee benefit plans. *See* ERISA §§ 101 - 106, 29 U.S.C. §§ 1021 - 1030. Where Congress intended only for employee pension benefit plans to report or disclose, the statute says so. *See, e.g.,* ERISA § 103(d),

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[3/] Because the plain language requires that a claimant is always required to prove the key element to a § 510 claim -- the employer's intent to interfere with the attainment of benefits under a welfare plan as a motivating factor for the discharge -- not every discharge resulting in a loss of benefits raises a § 510 claim. *E.g., Fitzgerald v. Codex Corp.*, 882 F.2d 586 (1st Cir. 1989) (employee fired because spouse filed an employee benefit claim).



29 U.S.C. § 1023(d) ("With respect to an employee pension benefit plan . . . "an actuarial statement shall be filed); ERISA § 105, 29 U.S.C. § 1025 ("each administrator of an employee pension benefit plan" . . . shall furnish upon a written request an individual benefit statement).

Part IV of ERISA prescribes fiduciary responsibilities toward all employee benefit plans. *See* ERISA §§ 401 - 414, 29 U.S.C. §§ 1101 - 1114. Neither Congress in these sections, nor this Court in its application of these sections has distinguished between types of benefit plans. *Varity Corp. v. Howe*, 116 S. Ct. 1065 (1996) (applying § 404 to a welfare plan); *Curtiss-Wright Corp. v. Schoonejongen*, 115 S. Ct. 1223 (1995) (applying § 402 to a welfare plan).

Finally, inclusion of welfare plans under § 510's protections is consistent with the Court's analysis of ERISA's preemption clause in *Ingersoll-Rand Co. v. McClendon*, 498 U.S. at 138-145 ("without [§ 510], employers would be able to circumvent the provision of promised benefits. We have no doubt that this claim is prototypical of the kind Congress intended to cover under § 510"). Thus, excluding interference with welfare plans from § 510's protections would raise serious questions about whether such claims are preempted by ERISA and about the continuing validity of the Court's decision in *Ingersoll-Rand*.

We recognize that there is a tension between ERISA's statutory provisions permitting an employer to modify or amend a plan, and ensuring that an employee receives all the plan's promised benefits. Such tension is not uncommon in legislation for it reflects compromises between competing interests. Indeed, Congress intended to strike a balance between protecting employees and encouraging employers to voluntarily establish employee benefit plans. *See* H. R.. REP. NO. 807, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S. Code Cong. & Admin. News 4670, 4678. Thus, flexibility in amending

plans encourages employers to voluntarily establish welfare plans, and to make more generous promises to the advantage of their workers. However, no inference should be drawn from this flexibility that the promises in place are illusory. Indeed, Section 510 helps make these promises credible. *See Heath v. Varity*, 71 F.3d at 258-59; *Seaman v. Arvida Realty Sales*, 985 F.2d at 546.

This interpretation of § 510, combined with cases such as *Curtiss-Wright Corp. v. Schoonejongen*, *supra,* results in ERISA prohibiting employers from terminating employees to avoid paying them benefits, but permitting employers to reduce or terminate non-vested benefits by simply amending plan provisions. *Seaman v. Arvida Realty Sales*, *supra.* The structure of ERISA, as well as its legislative history, supports this result. *Id.; cf. Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 747 (1985) ("our decision results in a distinction between insured and uninsured plans ....").

### C. ERISA's Legislative History Supports § 510's Protection of Rights Attainable Under Welfare Plans.

As part of its carefully integrated regulatory scheme, Congress included various safeguards "to completely secure the rights and expectations brought into being by this landmark reform legislation." S. REP. NO. 127, 93d Cong., 2d Sess. (1973), *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 4838, 4872. Congress heard evidence that some employers used "economic sanctions or violent reprisals" to prevent employees from receiving benefits to which they were entitled. *Id.* Thus, provisions in both the House and the Senate bills made it "unlawful to interfere with the attainment of any rights to which a participant or beneficiary may become entitled . . . ." H. R. CONF. REP. NO. 1280, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S. CODE CONG. & ADMIN. News 5038, 5110.



The conference committee adopted § 510 with little comment, except to make clear that "the participant or beneficiary may bring a civil action against any person who interferes with his rights which are protected under the Act." *Id.* When introducing the conference report in the Senate, Senator Harrison Williams, chairman of the Senate Committee on Labor and Public Welfare, confirmed that the law contained protection against "discharge, or other discriminatory conduct toward participants and beneficiaries which is designed to interfere with attainment of vested benefits or other rights under the bill . . . ." 120 Cong. Rec. S. 15,737 (Aug. 22, 1974) (statement of Sen. Williams), *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 5177, 5188 (emphasis added).

Although the primary objective of § 510 was to prohibit employers from terminating employees just prior to vesting in their pension, 1974 U.S. CODE CONG. & ADMIN. NEWS 4838, 4872, it is also clear that this was not the only discriminatory act Congress desired to prohibit. Congress wanted to protect employees against the panoply of actions an employer could take to discriminate against an employee including making work life so uncomfortable to amount to a constructive discharge, 119 Cong. Rec. 30374, *reprinted in* SUBCOMM. ON LABOR, SENATE COMM. ON LABOR AND PUBLIC WELFARE, LEGISLATIVE HISTORY OF THE EMPLOYEE RETIREMENT SECURITY ACT OF 1974, Pub. L. No. 93-406 (Comm. Print 1976) at 1775-76 (statement of Sen. Hartke), as well as to protect rights other than vested benefits. 120 Cong. Rec. S. 15,737 (Aug. 22, 1974) (statement of Sen. Williams), *supra.*

## CONCLUSION

The plain language of § 510 of ERISA, the relationship of § 510 to ERISA's structure, and ERISA's legislative history all lead to the conclusion that ERISA § 510 protects against an employer's interference with the attainment of rights under an employee welfare benefit welfare plan. For the foregoing reasons, AARP and NELA urge the Court to reverse the decision of the Ninth Circuit Court of Appeals.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1996

INTER-MODAL RAIL EMPLOYEES ASSOCIATION, THOMAS PHANEL, CHARLES JONES, TOMMY MARTIN, HOYT JARRARD, and ROBERT STEIN,

*Petitioners,*

v.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, SANTA FE TERMINAL SERVICES, INC., and SF-TERMINAL SERVICES, DIVISION OF MIJACK PRODUCTS, INC.,

*Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

## BRIEF AS *AMICI CURIAE* OF THE EMPLOYERS GROUP, THE NATIONAL ASSOCIATION OF MANUFACTURERS, AND THE ASSOCIATION OF AMERICAN RAILROADS IN SUPPORT OF RESPONDENTS


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U.S. Department of Labor, *Employment Cost Index July-September 1996* (Oct. 1996) . . . . . 11

U.S. General Accounting Office, Human Resources Div., *Employer-Based Health Insurance: High Costs, Wide Variation Threaten System* (GAO/HRD-92-125) (1992) . . . . . 11


IN THE

**SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM, 1996

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No. 96-491

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INTER-MODAL RAIL EMPLOYEES ASSOCIATION, THOMAS FRANKS, CHARLES JONES, TOMMY MARTIN, HOYT JARRARD, and ROBERT STEIN,
*Petitioners*,

v.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, SANTA FE TERMINAL SERVICES, INC., and IN-TERMINAL SERVICES, DIVISION OF MI-JACK PRODUCTS, INC.,
*Respondents*.

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On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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**BRIEF AS *AMICI CURIAE* OF THE EMPLOYERS GROUP, THE NATIONAL ASSOCIATION OF MANUFACTURERS, AND THE ASSOCIATION OF AMERICAN RAILROADS IN SUPPORT OF RESPONDENTS**

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## INTEREST OF *AMICI CURIAE*

*Amici* are associations of employers located throughout the United States. Their members sponsor employee

benefit plans subject to the Employee Retirement Income Security Act of 1974 ("ERISA").[1] The Employers Group, headquartered in California, is one of the nation's oldest and largest human resources management associations. Formerly known as the Merchants & Manufacturers Association and the Federated Employers, it represents nearly 5,000 companies employing an aggregate of more than 2.5 million employees.

The National Association of Manufacturers ("NAM") is the nation's oldest and largest broad-based industrial trade association. Its more than 14,000 member companies and subsidiaries, including 10,000 small manufacturers, employ approximately 85 percent of all manufacturing workers and produce over 80 percent of the nation's manufactured goods. More than 158,000 additional businesses are affiliated with NAM through its Associations Council and National Industrial Council.

The Association of American Railroads ("AAR") is a non-profit, incorporated trade association of the nation's major railroads. AAR's members operate approximately 73 percent of the line haul mileage, employ approximately 89 percent of the workers, and generate approximately 91 percent of the freight revenues of all railroads in the United States.

All of these associations represent their members by, among other ways, *amicus* participation in cases like this one

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[1] This brief is filed with the consent of the parties. Their letters of consent have been filed with the Clerk of the Court with this brief.



that present significant issues of interest to their members. This case arises from the action of respondent The Atchison, Topeka and Santa Fe Railway Company to reduce the costs of its operations in Los Angeles by contracting out to an unrelated company cargo-loading work that had previously been provided by a subsidiary. Employees who had performed this work were terminated from employment, and many of them were hired to work for the new contractor. As a result of this action, affected employees, including petitioners, lost certain non-ERISA benefits and received reduced levels of ERISA-covered benefits. They challenge their termination of employment as unlawful under § 510 of ERISA, 29 U.S.C. § 1140.

This case presents the first opportunity for the Court to construe § 510 in the context of an employer's decision to restructure its business in a way that affects ERISA-covered benefits. *Amici* are concerned that arguments offered by and in support of petitioners in this case could, if accepted by the Court, subject employers to substantial litigation and liability under § 510 of ERISA. Congress enacted § 510 to protect an employee from an adverse employment action, such as a discharge, that was intended to interfere with that employee's attainment of a particular benefit right. *Amici* believe that § 510 can and should be interpreted to fulfill that congressional purpose without also prohibiting employers from taking into account the costs of employee benefits, which typically represent a significant portion of compensation costs, in deciding how best to structure their businesses.

## SUMMARY OF ARGUMENT

Section 510 of ERISA, 29 U.S.C. § 1140, prohibits an employer from discharging, or taking other adverse actions against, a participant in an ERISA-covered employee benefit plan for the purpose of interfering with that participant's attainment of rights under the plan or ERISA. Recognizing that any termination of employment interferes with a participant's future ability to obtain plan benefits, courts have held that § 510 is violated only where a plaintiff can show that the termination of employment was undertaken with a "specific intent" to interfere with that plaintiff's attainment of benefit rights.

In the case of an individual participant who has been terminated from employment, it is not sufficient to establish "specific intent" to show that the termination saved the employer the normal costs of that participant's future benefits. Rather, the participant must show that an intent to interfere with his or her attainment of some particular benefit right, typically one that involves high costs to the employer, motivated the termination. The same rule ought to apply in the case of structural or organizational changes by employers -- such as a divestiture, plant closing, or outsourcing -- that result in the termination of employees. It is normal for an employer in such situations to consider possible savings in compensation costs, of which benefit costs are a significant portion, in deciding whether or how to make such a change.

Nothing in the language of § 510 suggests that employers should be prevented from making such changes if they are based on consideration of the normal costs of maintaining employee benefit plans as contrasted to targeting



of particular employees because of their benefit rights. Nor does the legislative history of § 510 support such a construction. Congress was aware that employers are influenced by cost issues in making decisions about benefit plans and did not draft § 510 so as to prohibit general benefit cost concerns from affecting employment actions. Similarly, the weight of federal circuit court decisions supports the view that an employer does not violate § 510 by making organizational changes that result in termination of employment unless those changes are motivated by a desire to interfere with particular participants' attainment of particular rights to benefits.

## ARGUMENT

Section 510 of ERISA provides, in relevant part:

> It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan, this title, section 3001, or the Welfare and Pension Plans Disclosure Act, or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan, this title, or the Welfare and Pension Plans Disclosure Act.

This single sentence of the statute includes two separate prohibitions. The first, referred to as the "anti-retaliation"

provision of § 510,[2] generally prohibits retaliation in response to the exercise of an ERISA-protected right; it has been only infrequently litigated and is not directly implicated in this case. The second prohibition, referred to as the "non-interference" provision,[3] has, however, been the subject of considerable litigation and governs the question presented to the Court. The two provisions mirror each other and, taken together, prohibit certain employment-related actions that are intended either to retaliate for a participant's past exercise of benefit rights or to interfere with the participant's future attainment of rights.

By its terms, § 510's non-interference provision makes it unlawful: 1) to discharge or commit other employment-related acts against 2) a participant or beneficiary 3) for the purpose of interfering with 4) the attainment of any right to which "such participant" may become entitled 5) under the plan or under Title I of ERISA (or prior law). Although the first two of these elements are sometimes disputed in other cases, petitioners here have adequately alleged that they were discharged from employment while they were participants in ERISA-covered employee benefit plans. The question presented is whether they have stated a

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[2] *See Stiltner v. Beretta U.S.A. Corp.*, 74 F.3d 1473, 1486 (4th Cir.), *cert. denied*, 117 S. Ct. 54 (1996); *McKinnon v. Blue Cross & Blue Shield of Ala.*, 935 F.2d 1187, 1189 (11th Cir. 1991).

[3] *See McClure v. Zoecon, Inc.*, 936 F.2d 777, 780 (5th Cir. 1991); *Berlin v. Michigan Bell Tel. Co.*, 858 F.2d 1154, 1164 (6th Cir. 1988); *Sorosky v. Burroughs Corp.*, 826 F.2d 794, 800 (9th Cir. 1987).



valid claim for relief for violation of § 510 by adequately pleading that their discharge was undertaken for the purpose of interfering with their attainment of rights under either a plan or ERISA.

This Court has recognized -- as the legislative history of § 510 makes clear -- that the "prototypical" claim covered under § 510 involves a termination of employment "motivated by an employer's desire to prevent a pension from vesting." *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 142-43 (1990), *citing* S. Rep. No. 93-127, at 35-36 (1973) and H.R. Rep. No. 93-533, at 17 (1973); *see also West v. Butler*, 621 F.2d 240, 245 (6th Cir. 1980) (characterizing § 510's legislative history as reflecting that its "prohibitions were aimed primarily at preventing unscrupulous employers from discharging or harassing their employees in order to keep them from obtaining vested pension rights"). This prototypical claim fits squarely within § 510's language since there is no question that an employment termination designed to prevent a participant from vesting has been undertaken "for the purpose of interfering with the attainment of" the right of "such participant" to vest, a right that is protected by ERISA. *See* ERISA §§ 201-211, 29 U.S.C. §§ 1051-1061.

The courts that have grappled with § 510 have recognized that the statutory language should not be read so that any termination of a plan participant's employment is considered to be interference with that participant's future attainment of rights under the plan. Refusing to construe the statute as providing a guarantee of continued employment for plan participants, those courts have held that § 510 should

not be construed to prohibit a termination of employment where the loss of benefit rights is merely a result, not a motivating cause, of the termination.[4] To distinguish lawful from unlawful terminations, they have articulated the requirement that a plaintiff seeking to prove a violation of § 510 must allege and prove that the defendant had a "specific intent" to interfere with that plaintiff's attainment of benefit rights.[5]

In the context of an employment termination of an individual plaintiff, the "specific intent" standard has been relatively easy to apply. If all a plaintiff can show is that termination of employment also terminated his or her

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[4] *Dister v. Continental Group, Inc.*, 859 F.2d 1108, 1111 (2d Cir. 1988) ("ERISA does not guarantee every employee a job until he or she has fully vested into a company's benefit plan"). *See also Gavalik v. Continental Can Co.*, 812 F.2d 834, 851 (3d Cir.), *cert. denied*, 484 U.S. 979 (1987) ("Proof of incidental loss of benefits as a result of a termination will not constitute a violation of § 510.")

[5] *Barbour v. Dynamics Research Corp.*, 63 F.3d 32, 37 (1st Cir. 1995), *cert. denied*, 116 S. Ct. 914 (1996); *Brandis v. Kaiser Aluminum & Chem. Corp.*, 47 F.3d 947, 950 (8th Cir. 1995); *Hopkins v. Seagate*, 30 F.3d 104, 106 (10th Cir. 1994); *Unida v. Levi Strauss & Co.*, 986 F.2d 970, 980 (5th Cir. 1993); *Daughtrey v. Honeywell, Inc.*, 3 F.3d 1488, 1491 (11th Cir. 1993); *Humphreys v. Bellaire Corp.*, 966 F.2d 1037, 1043 (6th Cir. 1992); *Meredith v. Navistar Int'l Transp. Corp.*, 935 F.2d 124, 127 (7th Cir. 1991); *Conkwright v. Westinghouse Elec. Corp.*, 933 F.2d 231, 238 (4th Cir. 1991); *Dytrt v. Mountain State Tel. & Tel. Co.*, 921 F.2d 889, 896 (9th Cir. 1990); *Gavalik v. Continental Can Co.*, 812 F.2d at 851.



participation in an employee benefit plan, then no "specific intent" to interfere with that plaintiff's attainment of benefit rights has been shown.[6] Courts have consistently recognized in these cases that evidence that the termination of an employee saved the employer the ordinary costs of that employee's future benefits is inadequate to establish the requisite "specific intent."[7] If, however, a plaintiff shows that the termination was motivated by some specific aspect of his or her benefit rights -- typically, that his or her attainment of a particular benefit right would significantly increase the employer's cost of providing benefits -- then "specific intent" has been demonstrated.[8]

Where a claim for violation of § 510 does not involve circumstances unique to an individual plaintiff but arises from what the court in *Andes v. Ford Motor Co.*, 70 F.3d 1332, 1337 (D.C. Cir. 1995) referred to as an "organi-

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[6] *Teumer v. General Motors Corp.*, 34 F.3d 542, 550 (7th Cir. 1994); *Unida v. Levi Strauss & Co.*, 986 F.2d at 980; *Clark v. Coats & Clark, Inc.*, 990 F.2d 1217, 1222 (11th Cir. 1992); *Conkwright v. Westinghouse Elec. Corp.*, 933 F.2d at 239.

[7] *See Conkwright*, 933 F.2d at 239 ("[The] suggestion that Westinghouse acted illegally because it acted to save money proves too much. Under that reasoning, any actions by an employer that result in savings would be suspect."); *see also Lehman v. Prudential Ins. Co.*, 74 F.3d 323, 330-31 (1st Cir. 1996).

[8] *See Salus v. GTE Directories Serv. Corp.*, No. 96-1744, 1997 U.S. App. LEXIS 473, *7 (7th Cir. Jan. 10, 1997); *Godfrey v. BellSouth Telecomm., Inc.*, 89 F.3d 755, 759-60 (11th Cir. 1996); *Folz v. Marriott Corp.*, 594 F. Supp. 1007, 1014-15 (W.D. Mo. 1984).

zational change" in the employer's business, the application of § 510 has proved more problematic. The fact that the employer's benefit cost savings may be greatly multiplied if many employees are terminated raises the specter of a greater motivation related to benefit costs. If, however, the employer's savings merely reflect the normal costs of these employees' future benefits, there is no greater reason to infer a specific intent to violate § 510 than there would be in the case of termination of an individual employee. Rather, because the statutory language applies equally to a termination of employment that affects only one employee and to a termination of many employees resulting from an organizational change, the application of that language should also remain the same.

Employers that want to remain competitive will continuously review whether their businesses might be structured or organized in some more efficient or productive manner. In many circumstances, companies have sold or divested business units that no longer fit within the companies' strategic plans.[9] Other companies have closed plants or facilities or laid off portions of their workforce.[10] Yet other situations, as in this case, have involved outsourcing, *i.e.*, a decision by a company that it could more efficiently purchase from an outside vendor goods or services that it

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[9] *See Andes*, 70 F.3d 1332; *Aronson v. Servus Rubber*, 730 F.2d 12 (1st Cir.), *cert. denied*, 469 U.S. 1017 (1984).

[10] *See Deeming v. American Standard, Inc.*, 905 F.2d 1124 (7th Cir. 1990); *Unida v. Levi Strauss & Co.*, 986 F.2d 970; *Varhola v. Doe*, 820 F.2d 809 (6th Cir. 1987).



formerly provided for itself.[11] In all of these instances of "organizational change," employees in the affected business unit are frequently terminated from employment as a result of the change.

An employer considering such an organizational change will naturally consider its cost implications, including any cost savings. Compensation costs are an obvious area of potential savings, and the costs of providing employee benefits are a significant portion of compensation costs.[12] As stated in the *amicus* brief of the United States, employers may be largely indifferent about the components of compensation cost savings; an employer will generally not care whether the reduction comes from wages or from non-wage compensation such as benefits. *See* Brief for the United States as *Amicus Curiae* Supporting Petitioners ("U.S. Br.") at 22-23. The application of § 510 should not depend on whether an employer is astute enough to recognize, or candid enough to state, that benefit costs played a significant

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[11] *Seaman v. Arvida Realty Sales*, 985 F.2d 543 (11th Cir. 1993), *cert. denied*, 114 S. Ct. 308 (1994).

[12] *See* U.S. Chamber of Commerce, *Employee Benefits* (1996) (average cost of employee benefits reached 42 percent of payroll in 1995); U.S. Department of Labor, *Employment Cost Index July-September 1996* (Oct. 1996); U.S. General Accounting Office, Human Resources Div., *Employer-Based Health Insurance: High Costs, Wide Variation Threaten System* (GAO/ HRD-92-125) (1992) at 4-6. *See also Conkwright v. Westinghouse Elec. Corp.*, 933 F.2d at 239 ("It is obvious that benefit costs make up a large amount of the costs of an employee to a company, and that pension rights are a substantial component of benefit costs.").

role in a decision to make an organizational change that resulted in termination of employees. An employer might outsource a service for reasons that are unrelated to compensation costs, such as to obtain access to a technology which it can not provide for itself or which can be provided more efficiently by an outside vendor. It is also possible that an employer might outsource in order to save total compensation costs but have no idea whether the savings were in any way attributable to employee benefit costs. For example, an employer deciding whether to contract out services that it currently provides internally will care about the contractor's price compared to its own cost of providing services, not about the components of the contractor's price. In any of these situations, plan participants who lost their jobs as a result of the outsourcing would also lose the ability to claim future benefits. Yet, since the employer's intent had nothing to do with benefit costs, much less benefit rights, it would be difficult to conclude that the employer had violated § 510 by undertaking the outsourcing for the purpose of interfering with the attainment of benefit rights.

The conclusion that § 510 has not been violated in these situations should not change merely because the employer identified benefit costs in general as one of the elements, or even the principal element, of the cost savings it hoped to achieve through the outsourcing. Many employers in such situations will, of course, focus on the components of cost savings in order to understand whether there are alternatives to outsourcing, including possible modifications to wages or benefits. Focusing on benefit costs is not necessarily the same thing as focusing on ERISA-covered benefit plans; as this case shows, *see* p. 19 *infra*, benefit



costs may be attributable to non-ERISA covered benefits. Assuming, *arguendo*, that a focus on benefit costs is equated to a focus on ERISA-covered benefit plans, the question is whether an employer's decision to outsource work or otherwise undertake an organizational change that results in the termination of employees is illegal under § 510 if it is motivated by a desire to save the normal costs of maintaining employee benefit plans, as contrasted to the practice, which § 510 plainly prohibits, of targeting individual employees for termination because they are about to attain particular benefit rights.

Petitioners do not suggest that their termination interfered with their attainment of particular benefit rights but argue that it was unlawful because it was undertaken "for the purpose of lowering the amount of health and welfare and retirement benefits that they would receive." (Pet. Br. at 15.) Similarly, the brief of the United States takes the position that the specific intent necessary to establish a violation of § 510 is proved where "there is evidence that an employer has contracted out its work, and thus discharged its employees, for the specific purpose of escaping obligations to pay benefits." (U.S. Br. at 23.) To the extent that such a construction of § 510 merely encompasses the prototypical claims of individual plaintiffs, it is unexceptional. For example, if evidence showed that an employer had outsourced work because employees in the affected business unit were close to vesting in their accrued pension benefits, each of those employees could state a claim for violation of § 510. To the extent, however, that this construction would brand as illegal under § 510 an employer's decision to outsource work that was motivated by a desire to save the

normal costs of maintaining employee benefit plans, as contrasted to a desire to prevent identifiable participants from attaining specific benefit rights, it is not warranted by the statutory language, legislative history, or case law.

Nothing in the language of § 510's non-interference provision suggests that plan participants in general are conferred protection against adverse employment actions that result from employer decisions based on the costs of their employee benefit plans. Instead, the statutory language focuses on interference with the attainment of rights by a "participant" and should be read only as applying in situations -- like the prototypical claim involving a discharge to prevent pension vesting --- where a particular participant is targeted for adverse employment action because of some particular benefit right yet to be attained. Of course, more than one participant could be targeted for the same reason, and a group of such participants may assert their claims in a single action. By its terms, however, § 510 confers individual protection for a participant or beneficiary from interference with "such participant's" attainment of benefit rights.

Nor does the legislative history of ERISA suggest a congressional intent that § 510 be construed to prevent employers from taking employment-related actions based on a general desire to eliminate or reduce their overall benefit costs. To the contrary, § 510's legislative history speaks directly only to the situation in which an individual is terminated or adversely affected in employment in order to prevent future attainment of a particular benefit right, such



as pension vesting.[13] Other portions of ERISA's legislative history, moreover, evidence a congressional recognition that employers' willingness to create and maintain employee benefit plans is heavily influenced by the costs of such plans.[14] Indeed, as the Court has held, Congress left employers generally free, subject to specific provisions of the statute and governing plan documents, to modify or even terminate benefit plans for any reason including their cost. *See Lockheed Corp. v. Spink*, 116 S. Ct. 1783, 1789 (1996); *Curtiss-Wright Corp. v. Schoonejongen*, 115 S. Ct. 1223, 1228 (1995). While none of this legislative history directly addresses whether § 510 was intended to prohibit an employer's consideration of benefit costs in taking actions that result in terminations of employment, it does make evident that Congress was aware of employers' cost concerns regarding benefit plans. If Congress had wanted to draft § 510 as the broad proscription suggested by petitioners and the United States, it could have done so, but it did not.

Nor does the case law in the federal circuits support such a broad reading of § 510. While, to *amici*'s knowledge, only one court has expressly attempted to analyze the application of § 510 in the context of organizational change, the results in decisions from other circuits are consistent with

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[13] *See* S. Rep. No. 93-127, at 26 (1973); 119 Cong. Rec. 30,044 (1973).

[14] H.R. Rep. No. 93-533, at 1. *See also Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134, 148 n.17 (1985) (warning against expanding liability beyond that intended by Congress "lest the cost of federal standards discourage the growth of private pension plans").

a construction of § 510 as not prohibiting employment actions that are not targeted at individual participants but are motivated by a general desire to reduce benefit costs. In *Andes v. Ford Motor Co.*, 70 F.3d 1332, the D.C. Circuit addressed a claim that an employer had violated § 510 when it sold a business unit, allegedly in order to avoid payment to employees in that unit of valuable early retirement benefits to which these employees would have become entitled in the future. The *Andes* opinion reviewed decisions from six other circuits that had considered claims of violation of § 510 in the context of employment terminations arising from an "organizational change" as distinct from terminations of "individual employees...in the absence of an organizational change." *Id.* at 1337. Noting that, as a practical matter, "it is highly unlikely that an organizational decision would not be motivated, at least in part, by benefit considerations," the court commented on the fact that five of the six circuits had "easily rejected" the § 510 claims and stated:

> This pattern suggests to us that our sister circuit courts have implicitly recognized that a corporate organizational change that results in the termination of employees is really not a prototype of the sort of action that § 510 was primarily designed to cover.

*Id.* Based on its examination of § 510's language and legislative history, the *Andes* court concluded that Congress intended that "an employer's decision to sell or close down an operation would not normally implicate § 510 merely because the action caused the termination of employees." *Id.*



The court went on to recognize, however, that "a company's basic organizational decision" would implicate § 510 where such a decision "merely masks a determination to interfere with the employees' attainment of benefit plan rights." *Id.* at 1338.

While the *Andes* court reached its conclusion by interpreting the word "discharge" as used in § 510 to refer only to situations involving individual terminations of employees, *amici* believe that the same conclusion follows from the principles discussed above. As *Andes* observed, the fact that a termination of employees affecting benefit rights occurs as a result of an organizational change is not by itself dispositive of the § 510 analysis. What is critical is whether the employment action at issue is targeted at identifiable participants in order to prevent their attainment of particular rights under a particular plan. Only if such a targeted action occurs should § 510 be violated.

Such a construction of § 510 is not only faithful to the language and recognized purpose of § 510 but it also would provide a remedy in the fact situations urged by the United States as warranting a broader construction. (U.S. Br. at 16-17.) Thus, the targeting for termination of employees who were about to incur huge medical expenses or to become vested in rights to particular benefits would be prohibited by § 510. What would not be prohibited is an employer's decision to divest a unit or to outsource work based, in whole or in part, on consideration of normal benefit costs.

The United States cites two circuit court decisions to support the broad proposition it advocates. (U.S. Br. at 23.)

One of those decisions, *Gavalik v. Continental Can Co.*, 812 F.2d 834 (3d Cir.), *cert. denied*, 484 U.S. 979 (1987), can, as noted in *Andes*, 70 F.3d at 1338-39, be read consistently with the construction of § 510 urged here by *amici*. In *Gavalik*, the court affirmed a finding of a § 510 violation on the part of a company that, among other actions, closed a production line in order to avoid paying the costs of special pensions that would be attainable by employees who worked there. Despite broad language in the Third Circuit's decision, its conclusion is entirely consistent with the view that the closing of the line violated § 510 because it was intended to interfere with the attainment of particular pension rights by particular employees.

The other decision, *Seaman v. Arvida Realty Sales*, 985 F.2d 543 (11th Cir. 1993), *cert. denied*, 114 S. Ct. 308 (1994), can not be read consistently with the interpretation that *amici* urge. There, a company decided to terminate its salespersons and offer them contracts as independent contractors which did not provide for certain benefits that were provided to employees. *Id.* at 544. The Eleventh Circuit held that plaintiff had stated a claim for violation of § 510 by alleging that her termination occurred "because she would not give up the right to continued participation in the health plan and for the specific purpose of interfering with her rights under ERISA." *Id.* at 546. Although the court's discussion focused on the situation of the individual plaintiff who had been terminated and had refused to accept independent contractor status, the opinion makes clear that all salespersons had been asked to become independent contractors and makes no mention of any particular benefit right that the plaintiff was about to attain. *Id.* at 544.



Assuming that no such particular right existed, *Seaman* misapplies § 510 and converts a plaintiff's status as a plan participant into a guarantee of continued status as an employee. There is no reason why § 510 should prohibit an employer from deciding that in the future it would prefer to obtain from outside contractors services that it has historically provided for itself. The fact that the plaintiff was offered a contract as an independent contractor should be irrelevant to the § 510 analysis since it is only the termination decision to which the statute arguably applies, and it is unlikely in the extreme that Congress could have intended to require that an employer refuse to contract with former employees in order to avoid violation of § 510.

Petitioners here do not suggest that their termination from employment had anything to do with any particular rights that any of them were about to attain under any ERISA-covered employee benefit plan. Indeed, although petitioners now attempt to recast their allegations as involving ERISA-covered benefit plans in which they were participants as a result of their Teamsters Union membership, the specific allegations of their Complaint all refer to non-ERISA covered benefits provided under the Railroad Retirement Act. (Pet. 28a, ¶¶ 28, 31; 29a, ¶ 33.) Even if their allegations did focus on ERISA-covered benefits, however, they still have alleged nothing to suggest that the motivation for their termination was anything other than general cost savings as contrasted to the targeting of individual participants to interfere with their attainment of particular plan rights that § 510 prohibits.

## CONCLUSION

For the foregoing reasons, *amici* urge the Court to affirm the decision of the Court of Appeals.[15]

[15] Petitioners, not supported by their *amici*, also ask the Court to decide what relief is available for a violation of § 510. (Pet. Br. at 36-39.) Because this question is not within the writ of certiorari granted by the Court, *amici* do not address it. If the Court were to address the question, it should reject petitioners' argument that the scope of "appropriate equitable relief" available under § 502(a)(3)(B) for a breach of fiduciary duty that the Court addressed in *Mertens v. Hewitt Assoc.*, 508 U.S. 248 (1993) differs from the scope of "appropriate equitable relief" available under § 502(a)(3)(B) for a violation of § 510.



Respectfully submitted,

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